



ST.MARY'S
UNIVERSITY

The Scholar: St. Mary's Law Review on Race
and Social Justice

Volume 1 | Number 1

Article 6

1-1-1999

A Mother Removed — A Child Left Behind: A Battered Immigrant's Need for a Modified Best Interest Standard

Julie Linares-Fierro
Ekvall & Bryne, L.L.P

Follow this and additional works at: <https://commons.stmarytx.edu/thescholar>



Part of the [Family Law Commons](#), and the [Immigration Law Commons](#)

Recommended Citation

Julie Linares-Fierro, *A Mother Removed — A Child Left Behind: A Battered Immigrant's Need for a Modified Best Interest Standard*, 1 THE SCHOLAR 253 (1999).

Available at: <https://commons.stmarytx.edu/thescholar/vol1/iss1/6>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in The Scholar: St. Mary's Law Review on Race and Social Justice by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact sfowler@stmarytx.edu, jcrane3@stmarytx.edu.

A MOTHER REMOVED – A CHILD LEFT BEHIND: A BATTERED IMMIGRANT’S NEED FOR A MODIFIED BEST INTEREST STANDARD

JULIE LINARES-FIERRO*

Miriam’s Story	
I. Introduction.....	255
II. Background.....	262
A. VAWA	262
B. Struggles of Immigrant Mothers and Their Children ...	265
C. The Best Interest Standard	267
III. Domestic Abuse	269
A. Domestic Violence in the United States	269
B. Domestic Violence and the Criminal Justice System ...	272
IV. Hardships Facing Battered Mothers	274
A. Financial, Emotional and Legal Burdens	274
B. Familial and Religious Obstacles	276
C. Lack of National Recognition and Societal Beliefs	277
D. Children Are Victims Too	278
E. Help for Battered U.S. Citizen Women.....	283
V. Immigrant Battered Women—A Mother’s “Choice”	284
VI. VAWA	295
A. The Need for Protection	295
1. The VAWA Process	296
2. Extreme Hardship Standard—There is Still Hope for Relief	299

* I would like to thank *The Scholar* Board for creating an inspiring and important new publication which I am sure will become an essential institution at St. Mary’s University. Also, I must thank the Board for going above and beyond the call of duty in preparing this Comment for publication. Without them, you would not be reading this note. Special thanks goes to my individual editor, Isabel de la Riva. Isabel was both a motivator and teacher to me during the entire writing process and it is to her I dedicate this Comment. Sincere gratitude is also due to my fellow writers who unselfishly aided me in finding much of the research material and encouraged me not to give up. Furthermore, I want to thank Professor Laura Burney for her comments and advice during the drafting process. Finally, I must thank my mother and husband: my mother for always urging me to write, and my husband for his patience, enthusiasm, and technical support throughout the last two years.

3. VAWA Options: Self-Petition	300
4. The Importance of VAWA	301
B. The Current Status of VAWA	302
1. VAWA's Source of Power—The Commerce Clause	302
2. The Federalism Limitation	303
3. Current Attacks	306
a. 4th Circuit Court's Decision Leaves No Relief for Immigrant Women	306
b. The Intersection Between <i>Lopez</i> and VAWA ..	307
4. Possible Ramifications on VAWA	311
C. VAWA II	313
VII. Best Interest Standard	314
VIII. A Proposal for the Modification of the Best Interest Standard	316
A. Obstacles in VAWA—Different Solutions	316
1. The Fight For Custody	316
2. Protection for the Children.....	317
3. The Possibility of A New Act	318
B. A Modified Best Interest Standard	319
1. Codified Presumption	319
2. Judges Working Together for a Common Goal	320
3. The Possibility of Visitation	320
IX. Conclusion	320

Miriam came to the United States from the Philippines. She met and married a U.S. citizen. From that union a daughter was born. Miriam wished to stay in the country legally and was depending on her husband's citizenship to petition for her own legal residency or citizenship. However, during the marriage, she became the victim of her husband's physical abuse and decided she needed to leave the marriage.

After she sought help from the police and obtained restraining orders, Miriam's husband decided he did not want to use his power, as a U.S. citizen, to gain legal residency for his wife. He withdrew his petition and requested that the Immigration and Naturalization Service (INS)¹

1. See STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 1 (1st ed. 1992) (providing the history and some functions of the INS). The Immigration and Nationality Act (INA) was passed in 1952 and has been amended numerous times throughout the years. *See id.* The INA is administered through the federal agencies. *See id.* The Attorney General plays a great part in carrying out the provisions of the INA, but has delegated functions to the Justice Department. *See id.* The Justice Department mostly uses the Immigration and Naturalization Service (an agency) to execute many immigration related mandates including educating the public, enforcing laws, acting as prosecutors in agency hearings, processing some applications, and inspecting travelers who arrive in the

remove Miriam from the country. Thereafter, the INS deemed Miriam removable and Miriam went into hiding with her daughter. Thus, Miriam, the undocumented battered immigrant, is forced to live on the run, afraid of what the future may bring for her daughter.²

There should have been some source of protection available for Miriam and her daughter. An immigrant woman must be assured a fair and equitable chance of remaining in the United States with her children, or at the very least, the opportunity to return to her home country with her children, if she is deported. To give immigrant women such opportunities, the traditional 'best interest' standard, used in most custody disputes, should be modified in cases involving potentially removable immigrant women with U.S. citizen children.

I. INTRODUCTION

To discuss the possibility of altering or expanding the best interest standard in custody cases involving a battered immigrant women, it is important to understand the different issues affecting such disputes. Many immigrants arrive in the United States with dreams of a better life. Often part of that dream includes marriage and family. Unfortunately, some immigrant women who marry once inside the United States, may face a much harder life than they anticipated.³ These women marry U.S. citizens or legal residents⁴ and depend on them to initiate proceedings for their legal status in this country.⁵ U.S. citizen husbands may petition the

United States. See ROY D. WEINBERG, *ELIGIBILITY FOR ENTRY TO THE UNITED STATES* 1 (1967) (explaining that Congress has an inherent constitutional power to regulate immigration into the United States).

2. See Felicia E. Franco, *Unconditional Safety for Conditional Immigrant Women*, 11 *BERKELEY WOMEN'S L.J.* 99, 99-100 (1996) (reporting Miriam's story).

3. See Michelle J. Anderson, Note, *A License to Abuse: The Impact of Conditional Status on Female Immigrants*, 102 *YALE L.J.* 1401, 1402-03 (1993) (explaining that although 12-50% of all married women experience domestic abuse, immigrant women probably experience abuse at a higher rate). Exact percentages of abused married immigrants are difficult to calculate, but the number is large: of undocumented immigrant women, 60% report having been abused by their husbands. See *id.* at 1403 n.9. Seventy-seven percent of immigrant women married to legal permanent residents report being abused as well. See *id.* at 1403.

4. See Franco, *supra* note 2, at 102 (claiming that each year, approximately 130,000-140,000 immigrant, mostly women, marry American citizens and gain permanent residency).

5. See *id.* at 103 (discussing the fact that, historically, immigration laws gave citizen and legal permanent resident husbands the power to rule their immigrant wives' residency status); see also Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 *SAN DIEGO L. REV.* 593, 602 (1991) (describing the subordinate role United States immigration law inflicted onto immigrant wives). The doctrine of coverture gave citizen or legal resident husbands control over his alien wife's legal status by requiring that he, and

INS for their spouse's citizenship.⁶ However, domestic violence is an unforeseen factor that plays a role in many marriages and ruins any chances the immigrant has of having a happy life or remaining in the United States.⁷

Domestic violence is an ominous problem⁸ and the instances of domestic abuse in this country are numerous.⁹ Between two and four million women are battered each year making violence in the home one of the major causes of injury to women in the United States.¹⁰ The abuse occurs regardless of distinctions based on race, class, ethnic group, religion or economics.¹¹ For those who are victims, such abuse causes turmoil. The

not his wife, file a petition for residency. *See id.* at 600; Franco, *supra* note 2, at 101 (asserting that "immigrant women are effectively held hostage by American Immigration laws that allow their husbands to control their residency status").

6. *See* Franco, *supra* note 2, at 103 (describing a history of U.S. immigration laws which granted "male citizens and permanent legal residents the right to control" their immigrant wife's immigration status, but denied citizen wives' the right to control their immigrant husbands' status); *see also* David Moyce, Comment, *Petitioning on Behalf of an Alien Spouse: Due Process Under the Immigration Laws*, 74 CAL. L. REV. 1747, 1748 (1986) (arguing that Congress has enforced immigration laws on aliens that would be found unconstitutional if forced on American citizens). Courts often defer to Congress in immigration issues even though other areas of law are subject to constitutional constraints. *See id.*

7. *See* Franco, *supra* note 2, at 102 (calling the instances of abuse of conditional permanent residents "by no means rare"). A San Francisco organization found that of 400 undocumented immigrants surveyed, 34% of the Latinas and 20% of Filipinas claimed they had been victims of domestic abuse. *See id.*

8. *See id.* at 99 (stating that "a woman is beaten in the United States every eighteen minutes"). Each year, four million women are battered in the United States. *See id.*

9. *See* William G. Bassler, *The Federalization of Domestic Violence: An Exercise in Cooperative Federalism or a Misallocation of Federal Judicial Resources?*, 48 RUTGERS L. REV. 1139, 1139-40 (1996) ("Domestic Violence is one of the country's most pernicious and persistent social problems").

10. *See* Jill C. Robertson, *Addressing Domestic Violence in the Workplace: An Employer's Responsibility*, 16 LAW & INEQ. J. 633, 636 (1998) (showing that 2-4 million women suffer violence at the hands of an intimate partner each year making domestic violence the greatest cause of injury to women); Jennifer M. Mason, Note, *Buying Time for Survivors of Domestic Violence: A Proposal for Implementing an Exception to Welfare Time Limits*, 73 N.Y.U. L. REV. 621, 640 (1998) (citing that 2-4 million women are battered each year); *see also* Andrea D. Lyon, *Be Careful What You Wish For: An Examination of Arrest and Prosecution Patterns of Domestic Violence Cases in Two Cities in Michigan*, 5 MICH. J. GENDER & L. 253, 259-60 (1999) (explaining that the chances of a woman being hurt because of domestic violence is six times greater than the chances of a man being hurt); Virginia H. Murray, *A Comparative Survey of the Historic Civil, Common, and American Indian Tribal Law Responses to Domestic Violence*, 23 OKLA. CITY. U. L. REV. 433, 433 (1998) (claiming that as many as four million women are victims of domestic violence every year).

11. *See* Peter A. Dutton, *Spousal Battering As Aggravated Assault: A Proposal to Modify the UC MJ*, 43 NAVAL L. REV. 111, 111 (1996) (echoing that "domestic violence affects people from every race, religion, ethnic group, educational, and socio-economic group"); *see also* Bassler, *supra* note 9, at 1141 (quoting that domestic violence "strikes at

victim not only fears the batterer, but may also fear the abuse will be discovered. The victim often feels such discovery would be humiliating or threaten a home life which the battered woman wishes to keep intact for various reasons.¹² For example, battered women fear their children will be taken away or they will lose the financial and legal support of their husbands.¹³ In addition, police or other governmental intervention may cause a division between family members.¹⁴ Some family members may side with the victim while others may stand behind the batterer.

Quite often the abused spouse does not have many options available in terms of relief. Her family and friends are either not sympathetic, do not wish to disrupt their own lives, or simply cannot afford to supply the abused with the resources she needs.¹⁵ Sadly, because of the lack of options, families are left to resolve such a serious and complicated problem

the heart of our society"); Tien-Li Loke, Note, *Trapped in Domestic Violence: The Impact of United States Immigration Laws on Battered Immigrant Woman*, 6 B.U. PUB. INT. L.J. 589, 589 (1997) (stating that "domestic violence is blind to distinctions based on class, race, ethnic, religious, and economic lines").

12. See Ryan Lilienthal, Note, *Old Hurdles Hamper New Options for Battered Immigrant Women*, 62 BROOK. L. REV. 1595, 1605 (1996) (mentioning the belief of domestic abuse as a private family issue); see also Anderson, *supra* note 3, at 1403 (stressing that an immigrant may be dependent on her spouse both emotionally and financially which greatly reduces options other than staying in the abusive relationship).

13. See Linda Kelly, *Stories from the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act*, 92 NW. U. L. REV. 665, 678 n.67 (1998) [hereinafter Kelly, *Stories from the Front*] (revealing that a number of immigrant women feared that if they told the truth about the abuse they were receiving, their husbands would be taken to jail leaving no one to support them or their children); see also Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95, 141 (1993) (claiming battered immigrants stay in abusive environments because they need their husbands' legal support in securing residency); Susan Girardo Roy, *Restoring Hope or Tolerating Abuse? Responses to Domestic Violence Against Immigrant Women*, 9 GEO. IMMIGR. L.J. 263, 268 (1995) (explaining that "socioeconomic, legal, and cultural issues combine to pressure a woman into staying with her husband").

14. See generally Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 27 (1991) (bemoaning that some social scientists write from a "family systems" view of domestic violence which requires that the woman consider what she may have done to provoke the violence of her mate). The "family systems" view of domestic violence holds both partners equally responsible for domestic violence. See *id.* If this premise exists among social scientists, then a similar view most likely exists in families where domestic violence occurs. See *id.* Therefore, if a woman reports the violence, and the government intervenes, factions among the family may occur. See *id.* This split may occur because some may believe the woman rightfully asked for help, while others contend she is equally at fault for the abuse and the batterer and family should not have to endure any criminal or social intervention. See *id.*

15. See Clemencia Prieto & Patricia Castillo, Address at the St. Mary's Center for Legal and Social Justice (Sept. 18, 1998) (arguing that battered immigrants often stay in these relationship because they have no where else to go or family and friends may not be able or willing to help); see also Loke, *supra* note 11, at 592. But see Anderson, *supra* note

internally.¹⁶ The longer violence remains undiscovered by those in a position to aid the battered woman, the greater the likelihood that the family will suffer. Not only are battered women subject to unknown danger within their own homes, the children of the marriage are victims as well.¹⁷ Among other things, the children suffer psychological trauma from witnessing the abuse of their mother.¹⁸ In more extreme situations, the children may not only helplessly watch the beatings their mother has to endure, but are physically abused themselves.¹⁹ Children who try to defend their mothers suffer even more harm.²⁰ Alarming, if the children

3, at 1403 n.11 (arguing that battered women may not have family or friends, or information on how to seek help, because they are new to the United States).

16. See Mason, *supra* note 10, at 628 (arguing that the last few years have brought an increase in awareness of domestic violence and it should not “be left to intra-family resolution”).

17. See Phillip C. Crosby, Comment, *Custody of Vaughn: Emphasizing the Importance of Domestic Violence in Child Custody Cases*, 77 B.U. L. REV. 483, 484 (1997) (arguing that children may directly be victims of violence as well as their mothers). A child who grows up in a violent home may have developmental problems and show signs of post-traumatic stress disorder. See *id.*; see also Amy Haddix, *Unseen Victims: Acknowledging the Effects of Domestic Violence on Children Through Statutory Termination of Parental Rights*, 84 CAL. L. REV. 757, 788 (1996) (stating that children who reside in a violent home are “very likely” to suffer emotional and physical abuse).

18. See Haddix, *supra* note 17, at 788 (containing a statement that “domestic violence committed against a mother has a profound effect on the children who witness it”). Some social scientists claim that a child witnessing the abuse of his mother is also being abused himself. See *id.* Witnessing the violence “for all intents and purpose” exposes a child to similar emotional feelings his mother is experiencing. *Id.*; see also Mary E. Asmus et al., *Prosecuting Domestic Abuse Cases in Diluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships*, 15 HAMLINE L. REV. 115, 121 (1991) (citing a study which reveals that between children raised in non-violent households and those who grow-up witnessing abuse, those witnessing abuse have greater rates of emotional and physical troubles). Some of the troubles children suffer include health problems, suicide attempts, criminal behavior, drug and alcohol dependency, dropping out of school, and early adult unemployment. See *id.*

19. See Michelle S. Jacobs, *Requiring Battered Women Die: Murder Liability for Mothers Under Failure to Protect Status*, 88 J. CRIM. L. & CRIMINOLOGY 579, 660 n.159 (1998) (stating that those men who habitually abuse their wives will also abuse their children); see also Daniella Levine, *Children in Violent Homes: Effects and Responses*, FLA. B.J., Oct. 1994, at 62, 63-64 (arguing that physical harm to children may range from extreme corporeal punishment, to harming unborn children, to death of a child); *White Ribbon Campaign Support Effort to Stop Domestic Violence*, POST-STANDARD, June 16, 1998, at A6 (claiming that in many of the homes where spousal abuse occurs, child abuse may also be present). A study shows a 30% miscarriage rate in those women who are victims of domestic violence. Levine, *supra*, at 63-64.

20. See Murray, *supra* note 10, at 434 (claiming that it is well-documented that children are often abused in homes where wives are abused). One study offers that 70% of men who beat their wives, also beat their children. See *id.*; see also Haddix, *supra* note 17, at 788 (finding that children may be harmed when “caught in the crossfire”).

learn violence is a normal part of family life, the abuse may be proliferated in future generations.²¹ Domestic violence threatens the fabric of the family.

A marriage in which one spouse is not a legal citizen or resident makes domestic violence even more tragic than a situation where both spouses are citizens. Not only is an immigrant battered woman facing the usual difficulties confronted by a citizen battered woman, she is also living in a foreign culture and digesting customs and practices which she may not be able to reconcile with those of her home country.²² There is also a great possibility the immigrant is undocumented, making her husband/batterer the only barrier standing between her and removal.²³ Hence, these women, because of their fear of deportation, become trapped in a situation where the batterer, with the U.S. government's assistance, can behave without accountability for his actions.

Fortunately, today, services are available to help U.S. citizen battered women escape or prosecute their batterers.²⁴ These services include police protection, protective orders, new laws, and low-cost or free legal

21. See Franco, *supra* note 2, at 136 (describing a study which revealed that 63% of batterers were raised in homes where their father battered their mother).

22. See Anderson, *supra* note 3, at 1403 n.12 (demonstrating that American citizen women are much more sophisticated about this country's culture, whereas immigrant women often cannot speak English); Franco, *supra* note 2, at 124 (claiming cultural differences often scare immigrant women from seeking help; therefore they return to their abusive husbands); see also Lisa R. Green, *Homeless and Battered: Women Abandoned by a Feminist Institution*, UCLA WOMEN'S L.J. 169, 170 (1991) (making the argument that Western feminists have a view that all women share a homogeneous "womanness" trait regardless of cultural differences; this view ignores the plight of women with different experiences).

23. See generally Kelly, *Stories from the Front*, *supra* note 13 (stating that many immigrant women believe their husbands are the only barrier standing between them and deportation).

24. See *Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1506 (1993) [hereinafter *Developments*] (arguing that shelters are a necessity for victims of domestic violence because they are a source of instant safety and support, making them an important part of successfully responding to domestic violence). Shelters provide a myriad of services for domestic violence victims. See *id.* For example, some services include financial and emotional counseling, support groups, advocacy, and call-in hotlines numbers. See *id.*

help.²⁵ Opportunities and services for battered women are increasing as society gains awareness of violence in the home.²⁶

Undoubtedly, any abused woman faces difficult and grave problems and decisions. However, battered women who are U.S. citizens have more options in terms of relief. Immigrant women often have more difficulty finding these same services.²⁷ This difficulty is caused by many agencies' and organizations' unwillingness to assist undocumented aliens.²⁸ Other times, the difficulties are caused because the immigrant believes any contact with these facilities will result in her removal from the United States.²⁹ Furthermore, battered immigrant women may fear

25. See *id.* at 1509 (seeking the aid in a shelter may enable the victim to ask for, and receive, legal intervention or protection against her abuser). For example, the victim may obtain a protective order or see criminal prosecution of her abuser. A civil protection order is "a legally binding court order that prohibits an individual from . . . further abusing their victim." *Id.* at 1509-10; see also Merle H. Weiner, *From Dollars to Sense: A Critique of Government Funding for the Battered Women's Shelter Movement*, 9 LAW & INEQ. J. 185, 192 (1991) (citing that new laws empower battered women to fight back). See, e.g., Linda Smith Dyer, *There Is No Excuse for Domestic Violence*, 13 ME. L.J. 5, 5 (1998) (citing low-cost legal counseling for battered women in Maine, where attorneys participate in pro bono work, including donating services to domestic violence shelters); Machaela M. Hocter, *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 CAL. L. REV. 643, 668 (1997) (stating that the California legislature began establishing shelters, which provide limited legal services, using revenue from marriage licenses); Mary E. Coogan, *Pro Bono Attorneys: A Sampler*, N.J. LAW., July-Aug. 1997, at 22, 25 (describing a project called Legal Services of New Jersey which began a domestic violence legal representation project providing training for volunteer attorneys wishing to represent victims of domestic violence); Linda Dakis & Lauren Lazarus, *Attacking The Crime of Domestic Violence: How Dade County is Protecting the Victim and Punishing the Perpetrator*, FAM. ADVOC., Spring 1997, at 46, 50 (showing that law students have participated in pro bono programs in assisting victims of domestic violence).

26. See Phyllis Goldfarb, *Describing Without Circumscribing: Questioning the Construction of Gender in the Discourse of Intimate Violence*, 64 GEO. WASH. L. REV. 582, 583 n.1 (1996) (stating that awareness of domestic violence has led to the opening of battered women's shelters, advocacy, safe places, and hotlines); see generally Gena L. Durham, *The Domestic Violence Dilemma: How Our Ineffective and Varied Responses Reflect Our Conflicted Views of The Problem*, 71 S. CAL. L. REV. 641, 663-64 (1998) (claiming that it is critical that those concerned about domestic violence, work together to raise public awareness of the issue to ensure that public and private funds are available to provide services).

27. See Sandra D. Pressman, *The Legal Issue Confronting Resident Aliens Who Are Victims of Domestic Violence: Past, Present, and Future Perspectives*, 6 MD. J. CONTEMP. LEGAL ISSUES 129, 135 (1994-95) (citing that although battered women and children may seek-out shelters, finding such help is often more difficult for immigrant battered women).

28. See Franco, *supra* note 2, at 131 (describing that most shelters for battered women "cater to white, middle-class, English-speaking American women," even though it is acknowledged that domestic violence crosses socio-economic, cultural, and ethnic lines).

29. See also Kelly, *Stories from the Front*, *supra* note 13, at 683 (claiming that fear of deportation cause immigrant battered women to retreat further from society); see also Bertha Esperanza-Truyol & Kimberly A. Johns, *Global Rights, Local Wrongs, and Legal Fixes:*

the laws and anti-immigrant attitudes that have become prevalent in American society.³⁰

In addition to the risk and danger the immigrant will face, a crucial factor in the equation is the immigrant's children. Unlike separations or divorces concerning two citizen spouses, an immigrant woman may have to fight for custody of her children, who may be citizens themselves, while trying to determine the status of her residency.³¹ What will happen to these children if their parents separate and one parent either does not have legislation to turn to, such as The Violence Against Women Act (VAWA),³² or has been denied relief under VAWA? Where should her children go? At a time when an increasing number of immigrants are facing removal from this country,³³ this type of dilemma makes domestic violence and custody issues involving non-citizen and citizen spouses even more difficult.³⁴

An International Human Rights Critique of Immigration Welfare Reform, 71 S. CAL. L. REV. 547, 615 (1998) (explaining that 64% of Latinas claim fear of deportation keeps them from seeking social services).

30. See George A. Martinez, *Foreword: Theory, Practice, and Clinical Legal Education*, 51 SMU L. REV. 1419, 1420 (1998) (claiming immigration law has become "increasingly anti-immigrant"); see also Kevin R. Johnson & Amagada Perez, *Clinical Legal Education and the U.C. Davis Immigration Law Clinic: Putting Theory into Practice and Practice into Theory*, 51 SMU L. REV. 1423, 1448 (1998) (stating that immigrants may fear the "anti-immigrant political climate").

31. See Interview with Monica Schurtman, Director, Human Rights Clinic, St. Mary's Center for Legal and Social Justice, in San Antonio, Tex. (Sept. 1998) (explaining that a woman, represented by the Clinic, fought for custody of her child while her residency status was pending); see also Franco, *supra* note 2, at 136 (demonstrating that American courts may not favor a battered immigrant with unstable residency status).

32. The Violence Against Women Act, Pub. L. No. 103-322, Title IV, 108 Stat. 1902 (codified as amended in scattered sections of 8, 18 and 42 U.S.C.).

33. See Pamela Constable, *Poll Over Immigrants' American Dream; Many Are Alarmed by New Law's Tougher Requirements for Remaining in U.S.*, WASH. POST, Mar. 27, 1997, at A1 (noting that the illegal population of the United States includes 2.9 million foreigners and 2.1 million immigrants who overstayed their visas). When the IIRIRA went into effect on April 1, 1997, immigrants were given six months to gain legal status or risk removal from the United States for at least three years. See *id.*; see also William, *Illegal Immigration Population Grows to 5 Million*, WASH. POST, Feb. 8, 1997, at A3 (reporting INS estimates that five million illegal immigrants reside in the U.S., a 28% increase from the past four years, and that the figure is rising at a rate of about 275,000 per year).

34. See Franco, *supra* note 2, at 141 (stating American batterer's may try to use their ability to petition for their immigrant spouse's legal residency as a tool to obtain permanent custody of the couple's children). As in many instances of domestic violence, the children may be pawns, used by the batterer to force his spouse to remain at home. See *id.* The crux of the problem is the fact that many of the children from these marriages are U.S. citizens. See Lynn M. Kelly, *Lawyering for Poor Communities on the Cusp of the Next Century*, 25 FORDHAM URB. L.J. 721, 723 n.3 (1998) (estimating that, in New York City alone, of those undocumented immigrant women who sought prenatal attention from 1987-

This Comment proposes a modified best interest standard to be used in custody disputes where one parent is an immigrant facing removal and the other is a U.S. citizen. Alternative ways for implementing the new standard, as well as their merits and possible pitfalls, will also be examined. Before reaching this proposal, many areas need to be explored. Part II of this Comment will discuss the background of Violence Against Women Act and of the struggles faced by immigrant women. An examination of VAWA is necessary to fully explore the options a battered immigrant mother has in custody disputes. Part III will examine domestic abuse in general, and will include a discussion about domestic violence and the criminal justice system. Part IV outlines some of the hardships facing battered women and demonstrates how children are also victims of domestic violence. Part V begins the discussion concerning the uniqueness of immigrant battered women's problems, while Part VI discusses VAWA, its purpose, enactments, requirements, and an example of its success. Part VI also includes a brief discussion of the current status of VAWA, focusing on the recent attacks against it. Part VI further describes VAWA II. Part VII discusses the "best interest" standard and how it affects immigrant women and their children. Finally, Part VIII explores different remedies to the circumstances faced by battered immigrant women, and some suggestions on how to fairly decide custody disputes when immigrants are involved.

II. BACKGROUND

A. VAWA

Aware of the dramatic rise in violent crimes against women in the United States, VAWA³⁵ was passed as part of the Omnibus Crime Bill.³⁶ VAWA was a Congressional bi-partisan effort,³⁷ passed in the midst of

1996, 130,400 citizen children were born); see also Christine J. Hsieh, *American Born Legal Permanent Residents? A Constitutional Amendment Proposal*, 12 GEO. IMMIGR. L.J. 511, 512 (1998) (explaining that American-born children of illegal immigrants are citizens by birthright); Bob Park, *Closing a Loophole For Illegal Immigration*, (visited Oct. 14, 1998) <<http://www.fairus.org/11-8html1>> (describing an "anchor birth" as a birth which occurs when an immigrant woman gives birth in the United States). By virtue of birth on U.S. soil, a child automatically becomes a citizen. See *id.* This child's citizenship provides the immigrant mother an avenue to legally remain in the United States, making the child an anchor for the mother or other family. See *id.*

35. Violence Against Women Act of 1994, Pub. L. No. 103-322, Title IV 108 Stat. 1902 (codified as amended in scattered sections of 8, 18, and 42 U.S.C.).

36. Violent Crime Control Act of 1994, Pub. L. No. 105-216, 108 Stat. 1796 (1994).

37. See Sally Goldfarb, *The Civil Rights Remedy of the Violence Against Women Act: Legislative History, Policy Implications, & Litigation Strategy*, Panel Discussion Sponsored by the Association of the Bar of the City of New York (Sept. 14, 1995), in 4 J.L. & POL'Y 391, 396 (1995) [hereinafter *Civil Rights Remedy*] (demonstrating that VAWA sponsorship

seemingly immense anti-immigrant feelings in the United States.³⁸ The main purpose of VAWA was to prosecute gender motivated crimes.³⁹

Congress' intent in enacting VAWA was to protect citizen and non-citizen battered women.⁴⁰ The law provides a federal civil form of relief for those who are victims of gender-motivated crimes.⁴¹ In order to bring a civil action under VAWA, an attacker must have intended to commit the crime because of "animus" against the victim's gender.⁴²

crossed party lines: in the Senate, VAWA had 67 co-sponsors while in the House, VAWA had 225 co-sponsors).

38. See Frederick Rose, *Latest Immigrants Face Tough Job Problems*, WALL ST. J., Nov. 28, 1994, at A1 (reporting that the public's anti-immigration sentiment was evidenced by California's legislation eliminating education and health care for illegal residents); see also Maria Puente, *U.S. Rewrites the Rules of Immigration*, USA TODAY, Dec. 5, 1994, at 6A (quoting Hispanic activists who characterize the nation's anti-immigrant sentiment as motivation for "the next great civil rights movement"). See generally Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111, 1144-46 (1998) (claiming "race played a prominent role" in the passage of California's Proposition 187). Governor Pete Wilson used Proposition 187 to boost a weak re-election campaign. See *id.* Wilson blamed illegal immigrants for decreased federal defense funds. See *id.* at 1145. One supporter called advocates for illegal immigration "anti-American." See *id.* Although Proposition 187 prevailed in a state-wide election, election results demonstrated voters were divided along racial lines. See *id.*; League of United Latin American Citizens v. Wilson, 908 F. Supp. 755 (1995) (quoting "The People of California find and declare . . . that they have suffered and are suffering economic hardship caused by the presence of illegal aliens in this state . . . they . . . are suffering personal injury and damage by the criminal conduct of illegal aliens in this state"). The court found federal law preempts most of Proposition 187's provisions. See *id.* at 776. But see Peter H. Schuck, *The Re-Evaluation of American Citizenship*, 12 GEO. IMMIGR. L.J. 1, 29 (1997) (asserting "even Pete Wilson . . . has defended the welfare benefits rights of illegal aliens . . .").

39. See Goldfarb, *Civil Rights Remedy*, *supra* note 37, at 397-98 (examining the legislative history of VAWA and the decisions to use the term "animus" in the act, which the author argues is ambiguous).

40. See Mason, *supra* note 10, at 659 (stating that VAWA allows battered immigrants to self-petition for residency without having to rely on an abusive partner); Lisa Barré-Quick & Shannon Matthew Kasley, *The Road Less Traveled: Obstacles in the Path of the Effective Use of the Civil Rights Provision of the Violence Against Women Act in the Employment Context*, 8 SETON HALL CONST. L.J. 415, 415 (1998) (articulating that the purpose of VAWA is to "remedy a myriad of problems" caused by domestic violence against women in the United States).

41. See *Is The Violence Against Women Act The Next Weapon?*, FLA. EMP. L. LETTER, June 1998, at 4 (revealing that the VAWA established a federal civil cause of action for victims of gender related violence). Although VAWA's title may be misleading, this legislation is a source of protection for both men and women.

42. See Goldfarb, *Civil Rights Remedy*, *supra* note 37, at 396 (citing that the words "purpose" and "intent" are synonymous to "animus"). The plaintiff in a VAWA cause of action is required to show that the victim's gender had a role "in the purpose or intent of the defendant who committed the crime." *Id.*

In addition to a civil remedy, VAWA gives immigrant women the chance to petition for legal residency or citizenship without the aid of their batterer husbands.⁴³ If the immigrant is aware of this opportunity, she may successfully be able to leave her abuser and gain her residency. Such legislation furthers and strengthens the crusade against domestic violence by sending the message that the United States not only values the safety of its citizen women, but also that of non-naturalized women living within its borders.

Despite the great need for legislation such as VAWA, the Act faces a threat. As a result of a recent case decided in the Supreme Court, *United States v. Lopez*,⁴⁴ VAWA's constitutionality has been questioned and may face an attack on federalism grounds.⁴⁵ The *Lopez* decision may affect VAWA because of the Supreme Court's limitation of Congress' power to enact legislation.⁴⁶ Although VAWA, unlike the statute in *Lopez*, offers civil relief, some still argue its involvement in criminal matters oversteps congressional power.⁴⁷

Recently, however, several federal appellate courts have held VAWA was constitutional when considering whether the statute was an over extension of congressional power.⁴⁸ However, the Court of Appeals for the

43. See Violence Against Women Act, 8 U.S.C. § 1154 (a)(1)(iii)-(iv) (1994).

44. See *United States v. Lopez*, 514 U.S. 549, 561 (1995) (depicting a case in which a student carried a gun into a school zone, thereby violating a federal act). In *Lopez*, student Alfonso Lopez, Jr., was convicted in U.S. District Court for possession of a firearm in a school. See *id.* at 551. This was a violation of Congress' Gun Free School Zone Act, which made it a federal crime for anyone to "knowingly to possess firearm at a place that individual knows or has reasonable cause to believe is [a] school zone." See *id.* Congress enacted the Gun Free School Zone Act pursuant to the Commerce Clause of the U.S. Constitution. See *id.*

45. See Kerrie E. Maloney, *Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence Against Women Act After Lopez*, 96 COLUM. L. REV. 1876, 1898 (1996) (claiming that critics classify VAWA as a federal family law). Marcellane Elizabeth Hearn, Comment, *A Thirteenth Amendment Defense of the Violence Against Women Act*, 146 U. PA. L. REV. 1097, 1166 (1998) (citing the "historical domestic relations exclusion of divorce, custody, and alimony cases" from the federal docket).

46. See *Lopez*, 514 U.S. at 561 (limiting Congress' Commerce Clause power, for the first time since Franklin Roosevelt's New Deal by holding that the Gun Free School Zone Act had nothing to do with commerce or any sort of economic enterprise).

47. See Melinda M. Renshaw, *Choosing Between Principles of Federal Power: The Civil Rights Remedy of the Violence Against Women Act*, 47 EMORY L.J. 819, 834 (1998) (noting that domestic issues which invade family and criminal matters have traditionally been left to the states' police powers).

48. See *United States v. Gluzman*, 154 F.3d 49, 50 (2d Cir. 1998), *petition for cert. filed*, (U.S. Feb. 18, 1999) (No. 98-1326) (affirming that VAWA is a "constitutional exercise of Congress' commerce power"); *United States v. Page*, No. 96-4083 1999 WL 92563, at *10 (6th Cir. Feb. 23, 1999) (rejecting a defendant's argument that VAWA is unconstitutional);

Fourth Circuit recently found VAWA unconstitutional.⁴⁹ The outcomes and possible progression of these cases to the Supreme Court may have a potentially destructive impact on VAWA.

If the Supreme Court rules VAWA is unconstitutional, any relief battered immigrants may have sought will be destroyed. Immigrants left without VAWA's relief may have only two options. Either the battered immigrant stays in the abusive relationship or she can leave the abusive spouse. If she chooses the latter option, it has been shown that the batterer spouse will cease his efforts to obtain citizenship for his abused wife. Therefore, the chances of the battered immigrant woman achieving legal residency or citizenship are diminished. Conversely, if the U.S. citizen spouse never commenced petitioning for the immigrant's legal residency status, the immigrant will remain undocumented, alone, and possibly without support in this country.

B. *Struggles of Immigrant Mothers and Their Children*

For those battered immigrants who are forced to remain with the batterer in hopes of attaining legal residency, staying in the relationship does not guarantee the batterer will file a residency petition. The immigrant, however, faces another threat. If the immigrant woman attempts to leave her abuser, he may report her undocumented status and whereabouts to the INS.⁵⁰ Thankfully, VAWA provides immigrants a way to leave their abusive husbands and to self-petition for residency.⁵¹ This legislation grants immigrants, such as Miriam, significant protection. However,

United States v. Wright, 128 F.3d 1274, 1275 (8th Cir. Nov. 14, 1997) (reversing the lower court case and holding that VAWA does not violate the commerce clause).

49. See *Brzonkala v. Virginia Polytechnic Inst. and State Univ.*, Nos. 96-2316, 96-1814 1999 WL 111891, at *96 (4th Cir. Mar. 5, 1999) (finding Congress overstepped its Commerce Clause power by enacting VAWA).

50. See Interview with Monica Schurtman, Director, Human Rights Clinic, St. Mary's Center for Legal and Social Justice, in San Antonio, Tex. (Sept. 1998).

51. See Kelly, *Stories from the Front*, *supra* note 13, at 705 (emphasizing that another form of relief was created under VAWA). In addition to the right to self-petition, VAWA enacted a new form of suspension of deportation which was later renamed "cancellation of removal" under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, (IIRIRA) Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C.). To obtain this special cancellation of removal, a battered immigrant must prove the following:

- (1) she is inadmissible under certain grounds,
- (2) battery or extreme cruelty by a permanent resident spouse or parent,
- (3) physical presence in the United States for a continuous period of 3 years;
- (4) good moral character for the last 3 years;
- (5) extreme hardship to the alien, alien's child, or alien's parent (if the child is an alien).

Id. No showing of a good faith marriage is required. See *id.*

although VAWA does provide aid, many immigrants are not guaranteed relief under VAWA.⁵² The Act has demanding requirements and standards each immigrant woman must prove and fulfill.⁵³ Immigrants who do not meet these standards, or are not able to find legal representation to help them through the process, may be removed from the country. Notwithstanding its strict requirements, VAWA is a much needed safety net for those immigrants who qualify for its protection.⁵⁴

Even if the immigrant succeeds in leaving her batterer without being reported to the INS, or is able to gain her legal residency under VAWA, she still faces other hardships. Often immigrant women may have depended on their spouses for financial support.⁵⁵ In addition, considering language and cultural barriers, finding an adequate job may be difficult.⁵⁶ Furthermore, the immigrant may be left without family, friends, or other emotional support systems.⁵⁷ Even more pressing than these concerns are the limited options left for the children of battered immigrant women. There are few desirable choices regarding the children of these unions. One alternative for the children is to remain in the United States without their mother, perhaps with a foster family, a stable member of the bat-

52. See Kelly, *Stories from the Front*, *supra* note 13, at 672-73 (expounding that VAWA requirements can be difficult or impossible to overcome and pointing out that the Illegal Immigration Reform and Immigrant Responsibility Act places limits on VAWA relief). VAWA's evidentiary requirements include proving: "(1) abuse (2) a valid marriage with a qualifying spouse, (3) good moral character and (4) extreme hardship." *Id.*

53. See *id.* at 673 (describing VAWA's requirements as a "terrific challenge"). Such demands may discourage battered immigrants from seeking aid. See *id.*; see also Interview with Monica Schurtman, Director, Human Rights Clinic, St. Mary's Center for Legal and Social Justice, in San Antonio, Tex. (Sept. 1998).

54. See Kelly, *Stories from the Front*, *supra* note 13, at 672 n.35 (reporting that approximately 500 immigrant women filed for relief under VAWA in 1997, its first fiscal year).

55. See Loke, *supra* note 11, at 593 (claiming battered immigrant women are controlled and isolated by their husbands partly because many of these women don't have their own money or credit); see also Angela Browne, *Reshaping the Rhetoric: The Nexus of Violence, Poverty, and Minority Status in the Lives of Women and Children in the United States*, 3 GEO. J. ON FIGHTING POVERTY 17, 19 (1995) (stating that immigrant women may be alone in the U.S. and therefore may not have family or friends to turn to for financial support); Leslye E. Orloff et al., *With No Place to Turn: Improving Legal Advocacy for Battered Immigrant Women*, 29 FAM. L.Q. 313, 324 (1995) (noting that few batterers who marry immigrant women will provide them with information about or access to family finances).

56. See Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461, 1485 (1998) (stating that many immigrants face employment obstacles stemming from language and cultural barriers); see also Nancy S. Kim, *The Cultural Defense and the Problem of Cultural Preemption: A Framework for Analysis*, 27 N.M. L. REV. 101, 139 n.284 (1997) (contending immigrant women do not have money, cannot speak English, and have curtailed access to resources).

57. See Browne, *supra* note 55, at 19 (claiming immigrant women who are alone in the United States may not have family or friends to turn to for emotional support).

terer's family or even the batterer himself.⁵⁸ However, the children may experience long periods of time without seeing their mother. This situation may be aggravated if the child's care-givers cannot afford the cost of travel to the mother's location.

Conversely, if the battered immigrant cannot receive aid from VAWA, either because she has been denied or because VAWA has been found unconstitutional, she may be forced to flee with the child.⁵⁹ As a result, the child may remain with his undocumented mother in the United States or return to his mother's country of origin. In any event, he is displaced from his home, and possibly his country of birth, and may be unable to see relatives in the United States for an unknown duration.

C. *The Best Interest Standard*

Typically, in custody cases, family court judges must consider what is in the "best interest" of the child.⁶⁰ Several elements are considered in applying the best interest standard.⁶¹ This standard is the most widely available and commonly used tool to decide with which parent a child will reside.⁶²

58. See Interview with Monica Schurtman, Director, Human Rights Clinic, St. Mary's Center for Legal and Social Justice, in San Antonio, Tex. (Sept. 1998).

59. See Franco, *supra* note 2, at 136-37 (providing that often times, an immigrant may take her children with her into hiding or return with them to her country of origin); Interview with Monica Schurtman, Director, Human Rights Clinic, St. Mary's Center for Legal and Social Justice, in San Antonio, Tex. (Sept. 1998) (explaining that in a case they handled, the immigrant women fled to her home country, taking her child with her).

60. See Susan L. Brooks, *Family Systems Paradigm for Legal Decision Making Affecting Child Custody*, 6 CORNELL J.L. & PUB. POL'Y 1, 10 (1996) (calling the best interests standard "traditional"); Danny R. Veilleux, *Age of Parent As a Factor in Awarding Custody*, 34 A.L.R. 5th 57, 64 (1995) (claiming courts are usually required to use the best interests standard, which is well-recognized). The "best interest" standard has traditionally been used in deciding custody cases. See *id.* at 64.

61. According to the Uniform Marriage and Divorce Act, Section 402, these elements include:

- (1) the child's wishes
- (2) the parent's wishes,
- (3) the relationship the child has with his parents and siblings,
- (4) the adjustment a child may experience, and the mental and physical health of all involved.

See UNIF. MARRIAGE AND DIVORCE ACT § 402 (amended 1973), 9 U. L. A. 282 (1998).

62. See Rene R. Gilliam, *When a Surrogate Mother Breaks a Promise: The Inappropriateness of the Traditional "Best Interests of the Child" Standard*, 18 MEM. ST. U. L. REV. 514, 518 (1988) (stating that all states currently use a best interests standard to decide questions of custody); Josie Redwine, *In re A.R.B.: Toward a Redefinition of the Best Interests Standard in Georgia Child Custody Cases*, 11 GA. ST. U. L. REV. 711, 715 (1995) (claiming most states have used the best interest standard in the last half of the Twentieth

Custody decisions involving one citizen parent and one deportable immigrant are quite different from custody disputes involving two citizen parents. One parent will almost certainly lose their ability to see the child. However, because domestic violence is increasingly becoming a consideration in determining the best interest of the child,⁶³ one may assume a batterer would not win custody of his children.⁶⁴ However, if a battered immigrant mother is removed from the country, without fair consideration of whether removal is in the best interest of the child, or whether the child should accompany her, the custody dispute is effectively over. Don't immigrant mothers deserve an equal chance at retaining custody of their children? Are these children less needful of their mothers simply because these women are from another country?

Immediately, questions arise as to whether the best interest standard is adequate for determining these citizen/immigrant custody cases. Judges may assume it is in the child's best interest to stay in the United States without evaluating the circumstances and without fairly considering the child's return to the mother's home country.⁶⁵ To eliminate the possibility that an immigrant's residential status will affect a judge's decision regarding custody between immigrant mothers and U.S. citizen fathers, courts should utilize a modified "best interest" standard to determine custody. Such a standard would consider (1) the abuse which occurred in

Century); Rebecca S. Snyder, *Reproductive Technology and Stolen Ova: Who Is the Mother?*, 16 LAW & INEQ. J. 289, 322 (1998) (contending that the best interests standard is most commonly used in custody disputes).

63. See *Krank v. Krank*, 529 N.W.2d 844, 847 (N.D. 1995) (stating that there is a statutory rebuttable presumption "that a parent who had perpetrated domestic violence may not be awarded sole or joint custody of a child"). The presumption can be rebutted only by clear and convincing evidence that it would be in the child's best interests for the violent parent to be the custodial parent. See *id.* at 848. See also David M. Gersten, *Evidentiary Trends in Domestic Violence*, FLA. B.J., July-Aug. 1998, at 65, 67 (pointing out that virtually every state requires domestic violence be considered in child custody cases); Lois Schwaebler, *Domestic Violence: The Special Challenge in Custody and Visitation Dispute Resolution*, DIVORCE LITIG., Aug. 1998, at 141 (revealing most states, including the District of Columbia, have either passed legislation that creates a rebuttable presumption against awarding custody to one who is violent towards a spouse, or has required that domestic violence be a factor in deciding the best interests of the child).

64. But see Beverly Horsburgh, *Lifting the Veil of Secrecy: Domestic Violence in the Jewish Community*, 18 HARV. WOMEN'S L.J. 171, 200 n.139 (1995) (giving an example of a study which shows abusive fathers fight for custody more often than non-abusive fathers); Ann Campbell White, *What You Didn't Learn in Law School: Family Law and Domestic Violence*, FLA. B.J., Oct. 1994, at 38, 39 (echoing a study which indicates abusive spouses engage in custody battles more often than their non-abusive counterparts).

65. See Cassandra Terhune, Comment, *Cultural and Religious Defenses to Child Abuse and Neglect*, 14 J. AM. ACAD. MATRIM. LAW. 152, 168 (1997) (describing an immigration case where a judge was asked to consider the ancient customs of the mother's native country when making a decision about deporting a woman and her two daughters).

the home, (2) the extent and type of the abuse, (3) the availability of non-abusive family members willing to assume responsibility for the child, (4) the conditions in the mother's home country—including financial, familial, social, and educational aspects, and (5) the child's wishes.⁶⁶

A modified standard for custody disputes in which one parent may be removed from the country must provide adequate assurance that immigrants will be equitably considered as custodial parents. The immigrant's status as "removable" should not be an unfair reflection on the immigrant's qualities as a parent. Therefore, a new standard must ensure judges fully consider both of the parents' situations, including any acts of violence, and not presume a child's best interest is served merely by forcing him to live in the United States.

III. DOMESTIC ABUSE

A. Domestic Abuse in the United States

Domestic abuse is a prevalent aspect of American society.⁶⁷ Abuse, though largely taboo and undiscussed, has historically been explicitly and implicitly endorsed by the American legal system.⁶⁸ It has been defined as "a pattern of coercive behavior that includes the physical, sexual, eco-

66. See D.W. O'Neill, *Child's Wishes As a Factor in Awarding Custody*, 4 A.L.R. 3d 1396, 1423 (1965) (stating that some jurisdictions adopt a specified age one must attain in order for that child's wishes to be taken into consideration by the court while other jurisdictions simply state the child must be of an age when the child may make an intelligent preference); see also Martin Guggenheim, *Reconsidering the Need for Counsel in Custody, Visitation, and Child Protection Proceedings*, 29 LOY. U. CHI. L.J. 299, 341 n.179 (1998) (giving an example of a Tennessee statute requiring that a state court must consider reasonable preferences of children ages twelve and over).

67. See Mason, *supra* note 10, at 640. Almost all (95%) of domestic violence victims are women. Also, 35% of women visit emergency rooms due to domestic violence and 63% of women, who are domestic violence victims, are beaten while pregnant. See *id.* Fifty-five percent of women seeking public mediation reported being victims of domestic violence. See *id.* It is further estimated that four million American women are victims of abuse received from their husbands or partners. See Ellen Waldman, *The Role of Legal Norms in Divorce Mediation: An Argument for Inclusion*, 1 VA. J. SOC. POL'Y & L. 87, 120 n. 125 (1993) (estimating that in the United States one-tenth to one-fifth of women are in intimate relationships where they are abused).

68. See Lilienthal, *supra* note 12, at 1602 (describing the "roots" of domestic violence in our legal system). For example, the doctrine of coverture declared a wife's identity merged with her husband's upon marriage, leaving the woman no legal identity. See *id.* Also, a husband had a right, under this doctrine, to chastise his spouse (rule of thumb law). See *id.* Nevertheless, the word "chastise" is seemingly an old-fashioned euphemism for battering. See *id.* Though the doctrines of coverture and chastisement have been admonished, the effects of such past laws still influence and undermine legal perceptions and jurisprudence today. See *id.*

nomic, emotional, and psychological abuse of one person by another.”⁶⁹ Daily, women across the county endure beatings and forcible rape at the hands of their husbands or boyfriends.⁷⁰ As a result, many of these victims suffer symptoms such as emotional distress, fear, anxiety, depression, nightmares, difficulty in concentration, and anger.⁷¹

Due to the overwhelming occurrences of domestic abuse in the United States, many ask, “why do these women stay?”⁷² There are numerous reasons why women remain in these situations. Many victims and abusers believe family violence should never be discussed with the world outside.⁷³ Victims and abusers also perceive that society condones domestic violence and that such violence is a private matter to be kept in the home.⁷⁴ Furthermore, the victim often suffers from low self-esteem

69. See Mason, *supra* note 10, at 639 (quoting Karla M. Digirolamo, *Myths and Misconceptions About Domestic Violence*, 16 PACE L. REV. 41, 44 (1995)).

70. See Lisa A. Carroll, Comment, *Women's Powerless Tool: How Congress Overreached the Constitution with the Civil Rights Remedy of the Violence Against Women Act*, 30 J. MARSHALL L. REV. 803 (1997) (illustrating how frequently women are raped and beaten by their husbands or boyfriends).

71. See Mason, *supra* note 10, at 640 (listing several “psychological distresses” of the battered women experience).

72. See Bobbi J. Vilacha, *More Than Victims: Battered Women, the Syndrome Society, and the Law*, 20 WOMEN'S RTS. L. REP. 43, 43 (1998) (book review) (claiming that women may experience a “traumatic bonding” which may cause the women into a “worshipful dependence on the all-powerful abuser”); see also Gregory G. Sarno, *Ineffective Assistance of Counsel: Battered Spouse Syndrome As Defense to Homicide or Other Criminal Offense*, 11 A.L.R. 5th 871, 881 (1993) (stating various reasons a woman stays in an abusive relationship). A woman may stay with a batterer if she convinces herself that the violence will end, she is from an abusive background, she blames herself for the violence, or she is financially dependent on the abuser. See *id.*; Berta Esperanza Hernandez-Truyol, *Las Olvidadas-Gendered In Justice/Gendered Injustice: Latinas Fronteras And The Law*, 1 J.GENDER RACE & JUST. 353, 382 (1998) (stating Mexican-American Women stay for the children's sake).

73. See generally Karen Musalo, *The Developing Jurisprudence of Gender-Based Claims*, 1021 PLI/CORP 291, 305 (1997) (giving an example of Guatemalan men who believe in male superiority and attempt to control their female partners through violence).

74. See Cheryl Hanna, *Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1508 (1998) (discussing a “historically sexist system that treated domestic violence as a private family matter”); Milton C. Regan, Jr., *How Does Law Matter?*, 1 GREEN BAG 2D 265, 271 (1998) (claiming that, in the past, husbands were not usually prosecuted for raping their wives which sent the message that husbands had the authority to use physical force against their wives); see also Lyon, *supra* note 10, at 265 (expounding that police usually ignore domestic violence calls or will not respond to them as quickly as other assault calls because domestic violence is viewed as a private matter); Pauline Quirion, *Why Attorney's Should Routinely Screen Clients for Domestic Violence*, B. B.J., Sept.-Oct. 1998, at 12, 13 (1998) [hereinafter Quirion, *Routinely Screen Clients*] (noting that the Surgeon General believes treating abuse as a private family issue reduces the importance of the issue).

and stays with her husband for fear that she cannot survive without him.⁷⁵ The batterer may also keep making emphatic apologies or promises to get help.⁷⁶ The genuine appearance of such apologies may convince the abused spouse there is hope for a violence-free relationship.⁷⁷ Some women decide to stay in the abusive relationship because the batterer has methodically destroyed any other friendships or familial relationships that she once had.⁷⁸ As a result, the spouse has become isolated. Most tragically, however, an abused woman may harbor guilt as a result of the abuse.⁷⁹ She may believe the abuse is her fault, not the abuser's.⁸⁰ Wo-

75. See Myrna S. Raeder, *The Better Way: The Role of Batterers' Profiles and Expert "Social Framework" Background in Cases Implicating Domestic Violence*, 68 U. COLO. L. REV. 147, 153 (1997) (claiming batterers tie their victims to them psychologically by destroying their self-esteem); Jean Peters-Baker, Note, *Punishing the Passive Parent: Ending a Cycle of Violence*, 65 U. Mo. Kan. City L. REV. 1003, 1021 (1997) (suggesting that a victims' lack of self-esteem contributes to the victim's inability to help herself); see also AUSTIN CENTER FOR BATTERED WOMEN, *The Intersection of Domestic Violence and Immigration Concerns*, at 314 (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (stating that the batterer isolates his victim, making her "psychologically dependent on the batterer as her only support system").

76. See Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1236 (1993) [hereinafter Dutton, *Women's Responses*] (expressing the belief that women often hope their partners will stop abusing them). Abused women often view small changes in their abusive spouses' behavior as signs that the abuse will end. See *id.*

77. See *id.* (stressing that an apology from the abuser may play a role in the woman's decision to stay).

78. See Sheryl L. Howell, Recent Development, *How Will Battered Women Fare Under the New Welfare Reform?*, 12 BERKELEY WOMEN'S L.J. 140, 143 (1997) (acknowledging that an abuser might become violent when the woman/victim spends time with her friends or family). Abusive men may go as far as restricting their female partners' phone use or intercept her mail. See *id.* This isolates the woman from her support group. See *id.*; see also Dutton, *Spousal Battering*, *supra* note 11, at 119 (analogizing domestic violence to a hostage situation where isolation and constant fear are ever present).

79. See Marjorie Conner Makar, *Domestic Violence: Why the Florida Legislature Must Do More to Protect the "Silent" Victims*, FLA. B.J., Nov. 1998, at 19 (claiming guilt and other symptoms are typical in battered women); Stephen J. Morse, *Excusing and the New Excuse Defenses: A Legal and Conceptual Review*, 23 CRIME & JUST. 329, 366 (1998) (asserting that women suffering from Battered Women's Syndrome suffer guilt, low self-esteem, and self blame); see also Anthony Tyler Barnes, Note, *Ireland's Divorce Bill: Traditional Irish and International Norms of Equality and Bodily Integrity at Issue in a Domestic Violence Context*, 31 VAND. J. TRANSNAT'L L. 643, 652 (1998) (stating that battered women feel guilty because they think they ruined their marriage).

80. See Amy R. Melner, *Rights of Abused Mothers vs. Best Interest of the Abused Children: Courts' Termination of Battered Women's Parental Rights Due to Failure to Protect their Children from Abuse*, 7 S. CAL. REV. L. & WOMEN'S STUD. 299, 306 (1998) (claiming battered women often accept responsibility for their abuser's behavior).

men feeling this type of guilt usually try to dismiss the severity of the abuse.⁸¹

B. *Domestic Violence and the Criminal Justice System*

Often the abused spouse has a more basic reason for remaining in the relationship. Leaving may mean a death sentence for her.⁸² Batterers may not let their victims escape their control. Sometimes the violence continues even if women are separated or divorced from their abusive partners.⁸³

Unfortunately, the police and authorities cannot, or will not, always protect the battered woman.⁸⁴ Because of the criminal justice system's aim at rehabilitation, incarceration for domestic violence cases is generally unlikely.⁸⁵ As a result, judges choose treatment as a condition for probation.⁸⁶

Although treatment is certainly an important aspect of rehabilitation, there is no evidence that treatment can indeed rehabilitate abusers.⁸⁷ The criminal justice system must explore sentencing alternatives that condemn violence against spouses and girlfriends, as well as impose

81. See Quirion, *Routinely Screen Clients*, *supra* note 74, at 13 (contending that victims of domestic violence "often underreport and may minimize abuse"); see also Peggy Fulton Hora & William G. Schma, *Therapeutic Jurisprudence*, *JUDICATURE*, July-Aug. 1998, at 8, 10 (stating that victims and abusers minimize the severity of the violence).

82. See Hearn, *supra* note 45, at 1160 (stating that statistics reveal an abusive partner is more likely to kill his victim/spouse after they separate); Peters-Baker, *supra* note 75, at 1021 (echoing that women are more likely to be killed after they separate from an abusive partner); Benjamin Z. Rice, *A Voice From People v. Simpson: Reconsidering the Propensity Rule in Spousal Homicide Cases*, 29 *Loy. L.A. L. Rev.* 939, 954 (1996) (asserting that women are more likely to be killed after leaving an abusive relationship).

83. See Joanne Fuller & Rose Mary Lyons, *Mediation Guidelines*, 33 *WILLAMETTE L. REV.* 905, 908 n.19 (1997) (finding that abuse continues even though women separate or divorce from their abusers).

84. See Hanna, *supra* note 74, at 1505 (giving an example of a victim's inability to escape her abuser due to the failure of the court system). A Chicago man, with nine prior documented incidents of abuse towards his girlfriend, finally pleaded guilty to choking her. *See id.* His girlfriend survived the attack. *See id.* In exchange for the batterer's guilty plea, the judge allowed him to enroll in a batterer treatment program. *See id.* Unfortunately, he was arrested for seeking-out and beating his girlfriend yet another time. *See id.* The judge then delivered and stayed a 120 day sentence. *See id.* This was on the condition that the batterer again enrolled and continued the treatment. *See id.* The batterer murdered his girlfriend one month later. *See id.* It was discovered that the victim was killed at a time when the batterer was scheduled to be attending counseling. *See id.*

85. *See id.* at 1508.

86. *See id.*

87. *See id.*

sentences that will be an effective deterrent to violent abusers.⁸⁸ While counseling an abuser is important, the courts should not overly rely on therapy. It is difficult to plan a treatment strategy when a standard “batterer-profile” does not exist.⁸⁹ Nevertheless, some judges allow batterers to complete a treatment program in lieu of conviction.⁹⁰

By allowing abusers to avoid a conviction and requiring counseling as the sole punishment, the court system may be unleashing a very angry batterer on his victim.⁹¹ The victim, who originally sought help from the authorities, may suffer more severe bodily harm, or death, if the abuser is angry.⁹² Furthermore, without a conviction on his record, the next time the batterer enters the criminal justice system, he may still be granted a lenient sentence. The judge may believe he is a first time offender.⁹³

Through its actions, however, the federal government has endorsed criminalization of domestic violence.⁹⁴ This endorsement is demonstrated by VAWA’s call for policies which require (1) arrest and prosecution, (2) an increase in the awareness and education of court employees and judges regarding domestic violence, (3) an improved method by which to keep statistics, and (4) increasing services to both the batterers

88. See *id.* at 1507 (expressing the misguided thinking that the current arrest and prosecution policies are adequately addressing domestic violence).

89. See *id.* at 1559-61.

90. See Hanna, *supra* note 74, at 1508.

91. See Pamela Blass Bracher, Comment, *Mandatory Arrest for Domestic Violence: The City of Cincinnati’s Simple Solution to a Complex Problem*, 65 U. CIN. L. REV. 155, 179 n.195 (1996) (stating that an abuser may be angry after a night in jail). There is little authorities can do regarding the batterer’s quick release from jail, and are unable to protect the battered woman. See *id.*; see also Hearn, *supra* note 45, at 1160 (noting that women are more likely to be killed by their abuser if they try to leave); Peters-Baker, *supra* note 75, at 1021 (bemoaning the fact that abused women are caught in a catch-22, they are beaten if they stay, but may be killed if they leave); Rice, *supra* note 82, at 954 (asserting that women are more likely to be killed after leaving an abusive relationship).

92. See Bracher, *supra* note 91, at 178-79 nn.192-97 (stating that an arrest does not serve to break the cycle of violence and may actually lead to more violence).

93. See Joan Zorza, *Mandatory Arrest for Domestic Violence—Why It May Prove the Best First Step in Curbing Repeat Abuse*, CRIM. JUST., Fall 1995, at 2, 54 (“Both advocates and police agree that domestic violence laws only work well if there is good record-keeping.”). Arrest with other criminal justice efforts, such as conviction, are far better for the purposes of deterrence than arrest alone. See *id.*

94. See Mason, *supra* note 10, at 637 (showing that VAWA is an indication of Congress’ desire that victims of domestic violence have access to federal resources and states that “Congress wants to encourage states to expand their resources to aid survivors of domestic violence”).

and their victims.⁹⁵ Despite such a policy, however, few batterers ever call a jail cell home.⁹⁶

IV. HARDSHIPS FACING BATTERED MOTHERS

Even if women do receive protection or aid from the police and the criminal justice system, they still face a number of other obstacles. If a battered woman is attempting to start a new life, she may be financially devastated as a result of her abusive relationship.⁹⁷ In addition, battered women are confronted with assorted emotional, legal, religious, and familial difficulties which almost inevitably arise. Compounding all of these problems is, of course, the overall lack of national attention to domestic violence.⁹⁸

A. Financial, Emotional and Legal Burdens

Women leaving abusive relationships often face financial, emotional, and legal difficulties when trying to create a new life. In fact, domestic violence has been called the “biggest issue for successful transition into

95. See Hanna, *supra* note 74, at 1516 (describing the policies enforced by VAWA).

96. See *id.* at 1523-24 (citing a study of 11 jurisdictions which revealed that out of 140 arrests, 95 defendants were not prosecuted even in a jurisdiction with a “no-drop” policy). The majority of the domestic abuse defendants received probation and suspended sentences while very few served time. See *id.* at 1524.

97. See generally Lesley E. Daigle, *Empowering Women to Protect: Improving Intervention with Victims of Domestic Violence in Cases of Child Abuse and Neglect; A Study of Travis County, Texas*, 7 TEX. J. WOMEN & LAW 287, 310 (1998) (finding that battered mothers who attempt to leave a batterer face “great financial insecurity”).

98. See Rita Smith & Pamela Coukos, *Fairness and Accuracy in Evaluations of Domestic Violence and Child Abuse in Custody Determinations*, JUDGES’ J., Fall 1997, at 38, 39 (citing a “historical failure of local law enforcement to intervene in domestic violence cases”). The woman’s family, the abuser’s family, or even their church may pressure the victim to work on the marriage despite violence. See Murray, *supra* note 10, at 437 (claiming that, even today, religious beliefs and institutions perpetuate domestic violence in the United States); Patricia A. Seith, Note, *Escaping Domestic Violence: Asylum As a Means of Protection for Battered Women*, 97 COLUM. L. REV. 1804, 1843 (1997) (claiming that, in some countries, police and family members refuse to assist fleeing battered women); see also Mary C. Carty, Comment, *Doe v. Doe and the Violence Against Women Act: A Post-Lopez Commerce Clause Analysis*, 71 ST. JOHN’S L. REV. 465, 466 n.5 (1997) (stating that before most states reformed their domestic violence statutes in the 1980’s, police were reluctant to make arrests); Stacy L. McKinley, Note, *The Violence Against Women Act After United States v. Lopez: Will Domestic Violence Jurisdiction Be Returned to the States?*, 44 CLEV. ST. L. REV. 345, 379 (1996) (calling domestic violence an overlooked problem: that is only recently receiving attention); Robertson, *supra* note 10, at 660 (stating that domestic violence has become more publicly visible, despite the fact that it use to be considered a private matter).

the workplace.”⁹⁹ An abused woman has often been financially dependent on her abuser.¹⁰⁰ Therefore, when a battered woman leaves her abuser, she may face difficulty in finding a job which will sufficiently provide support for her and her children.¹⁰¹ The woman may lack experience or education.¹⁰² These situations are worsened by the fact that women consistently receive lower compensation for the work they perform.¹⁰³ Even though women’s compensation may be lower than their male counterparts due partly to childbearing and other familial responsibilities which interrupt occupations and careers,¹⁰⁴ lower compensation may be attributed to the prevalence of notions of male dominance and superiority which have existed in this country since its creation.¹⁰⁵ Subsequently, a woman may receive a job which inadequately covers the costs of living.¹⁰⁶ In addition, if a woman does attempt to establish herself in the workplace, batterers often try to ruin such efforts by increasing the level of violence, preventing the woman from studying, causing the woman to be late for work, and/or harassing her at work.¹⁰⁷

Furthermore, emotional healing may require much of the woman’s energy and focus over a long period of time. While experiencing such an

99. See Mason, *supra* note 10, at 641 (stating how the dynamics of domestic violence make joining the workplace difficult).

100. See *id.* at 640-41.

101. See *id.* at 666 (stating that when women leave a batterer, or go “underground,” they may fear giving new or potential employers their addresses or references which prevents them from obtaining or keeping new jobs); Loke, *supra* note 11, at 609 (commenting that many battered women have to quit their jobs in order to hide from the batterer). Furthermore, battered immigrant women may be further challenged by the lack of education or skills necessary to find a job. See *id.*

102. See Dutton, *Women’s Responses*, *supra* note 76, at 1233 (contending that battered women may be prevented from getting an education or skills because of lack of resources). But see Makar, *supra* note 79, at 14 (claiming that factors such as education cannot be used to predict domestic violence among women and that one study showed “the majority of battered women surveyed were intelligent and well-educated”).

103. See Waldman, *supra* note 67, at 152 n.117 (showing the average salary of divorcing couples seeking public mediation assistance is \$8,660 for men and \$7,675 for women).

104. See *id.* at 152.

105. See Eric Solberg & Teresa Laughlin, *The Gender Pay Gap, Fringe Benefits, and Occupational Crowding*, 48 INDUS. & LAB. REL. REV. 692, 692 (1995) (revealing that “women are found to have received significantly lower compensation than men”); see also Molly S. McUsic & Michael Selmi, *Postmodern Unions: Identity Politics in the Workplace*, 82 IOWA L. REV. 1339, 1353 (1997) (giving an example of corporate executives which likely gave women and minorities lower compensation as a way to moderate union demands for higher compensation for white male employees).

106. See Waldman, *supra* note 67, at 152 (claiming that of those seeking mediation for divorce, 13% of all employed clients with children reported monthly earnings below the poverty line).

107. See Mason, *supra* note 10, at 641

involved and difficult process, the woman may have other worries as well. For example, a woman may continue to need protection from her batterer. She may have to petition for protective orders and continue to ask for the aid of the police or courts. In addition, if the woman has children, she may need to find a lawyer and attend court in order to obtain custody of her children.¹⁰⁸

These factors cause many abused women to feel they cannot financially survive without the aid of their batterers. These women do not have the means to leave their batterer, care for their children, find a job, and engage in a long and emotional legal battle. The financial impact is evident. In fact, between fifty and eighty percent of women who receive welfare benefits are currently, or were formerly, victims of physical and/or sexual abuse.¹⁰⁹

B. *Familial and Religious Obstacles*

Women also have to cope with familial pressure to stay in the abusive relationship.¹¹⁰ This pressure is more evident in women who believe that they are religiously bound to their husbands through marriage.¹¹¹ Many women feel they must endure the violent relationship as a condition of their faith and for the sake of their families.¹¹² If the immigrant comes from a family which places great emphasis on being married and staying married, she may also feel she must remain in her marriage. Furthermore, some families may believe that if a couple divorces, the children

108. *See id.* at 628.

109. *See id.* at 629.

110. *See Smith & Coukos, supra* note 98, at 39 (stating that a victim's family may pressure her to stay in the abusive marriage). *See generally* Karin Wang, *Battered Asian-American Women: Community Responses from the Battered Women's Movement and the Asian American Community*, 3 *ASIAN L.J.* 151, 169-70 (1996) (asserting that Asian-American families discourage a battered woman from seeking help and therefore "keep the violence hidden inside the family"); Franco, *supra* note 2, at 132 (describing that there is great pressure on South Asian women to maintain their marriage despite abuse).

111. *See Smith & Coukos, supra* note 98, at 39 (stating that the family church may pressure the women to stay); Linda L. Ammons, *Discretionary Justice: A Legal and Policy Analysis of a Governor's Use of the Clemency Power in Cases of Incarcerated Battered Women*, 3 *J.L. & POL'Y* 1, 79 (1994) (stating religious beliefs sometimes compel a woman to stay with an abusive husband); Judith Wang, *Pro Bono Attorney's Domestic Violence Victims Cope With System*, *MONT. LAW.*, Nov. 21, 1996, at 3 (contending that "a domestic violence victim may be stuck in a violent relationship because of . . . religious beliefs about marriage").

112. *See generally* Mary Rouke, *A Woman's Place: What Denominations Think*, *L.A. TIMES*, June 16, 1998, at E2 (discussing a Baptist Church's article requiring a wife "to submit graciously to the servant leadership of her husband").

are either stigmatized as somehow less legitimate or will suffer harm by not living in a home with both parents.¹¹³

C. Lack of National Recognition and Societal Beliefs

Within the last twenty years, the taboo against speaking about abuse in the home has slowly been lifted.¹¹⁴ However, because discussion about domestic abuse has only recently become more widespread, many women believe there is inadequate, empathetic assistance available to them.¹¹⁵ Such belief is bolstered by the fact that many women grew up in homes in which their mothers were brutalized.¹¹⁶ Therefore, many simply believe such abuse is a normal part of life.¹¹⁷ If their mothers did not, or could not, receive any help, why should they look for help? Why should they think any help is available for them? Such a cycle may be the result of our nation's past implicit, and at times explicit, acceptance and endorsement of domestic violence.¹¹⁸ The condoning of domestic violence is ap-

113. See Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19, 67 (1995) (discussing the view that single-parent families, including those that resulted from divorce, are inherently dysfunctional). See generally J.W. Northrop, *Construction of Statute Making Bigamy or Prior Lawful Subsisting Marriage to a Third Person a Ground for Divorce*, 3 A.L.R. 3d 1108, 1127 (1998) (citing an instance in which old Spanish law and judges decreed that divorce might bastardize the children of the marriage).

114. See Phyllis L. Crocker, *Feminism and Defending Men on Death Row*, 29 ST. MARY'S L.J. 981, 990 n.20 (1998) (purporting that in the 1970's, wife battering was characterized as a "publicly taboo" subject for social and governmental agencies); see also Joan L. Neisser, *Lessons for the United States: A Greek Cypriot Model for Domestic Violence Law*, 4 MICH. J. GENDER & L. 171, 218 (1996) (acknowledging taboos that are still present in discussions about domestic violence).

115. See Neisser, *supra* note 114, at 218 (discussing women's fear of filing complaints against their abusers).

116. See Sarno, *supra* note 72, at 881 (stating a woman may stay in an abusive relationship because she grew up in a home where such violence was the norm); see also Had-dix, *supra* note 17, at 790 (purporting that children who grow up in violent homes will adopt the behavioral patterns they observe and that a young girl who witnesses the abuse of her mother, by her violent father, may grow up to be withdrawn and dependent).

117. See Sarno, *supra* note 72, at 881 (asserting that women may stay in an abusive relationship because they grew up in a violent home). But see *The Dynamics of Domestic Violence*, DOMESTIC VIOLENCE TRAINING MANUAL (Md. Inst. for Continuing Prof. Educ. of Law.), Oct. 1998 (claiming "[t]here is no evidence that previous victimization either as adults or as children results in women seeking out or causing current victimization.").

118. See *State v. Oliver*, 70 N.C. 60, 60 (1874) (describing the "rule of thumb" as actual law in the late 1800's, which allowed "discipline" his wife with a rod no thicker than the width of his thumb); see also Mary Schoullvieller, *Leaping Without Looking: Chapter 142's Impact on Ex Parte Protection Orders and the Movement Against Domestic Violence in Minnesota*, 14 LAW & INEQ. J. 593, 632 (1996) (explaining that domestic abuse of women is a "product of society's acceptance" and support of male superiority and female inferiority); Bernadette Dunn Sewell, *History Of Abuse: Societal, Judicial, and Legislative Responses to the Problem of Wife Beating*, 23 SUFFOLK U. L. REV. 983, 984 (1989)

parent in past laws and the informally recognized societal beliefs about women's inherent nature and roles in everyday life.

D. *Children Are Victims Too*

Whatever their reasons for staying, women living in these life-threatening situations are not the only victims. The children in these homes are often victims of physical abuse as well.¹¹⁹ In *Ohio v. Engle*,¹²⁰ the Ohio Supreme Court restated one family's shocking history of violence which eventually resulted in the death of at least one child. Edna Mae and John Engle, Jr. were the parents of ten children.¹²¹ The children's aunt, John Engle's sister, reported to police that she believed one of the Engle's children had been murdered by his father.¹²² It was later revealed, by Edna Mae Engle, that four and a half year-old Christopher Engle died after his father poured scalding hot water over the child because he had soiled his pants.¹²³ He died two days after the incident.¹²⁴ The case record revealed that John Engle, Jr. had begun emotionally and physically abusing his wife in 1973, one year after the couple married.¹²⁵ Incidents of abuse against the couple's children were first reported in 1975, when an informant told police that John Engle Jr. ("John") had beat his twenty-three-month-old son, John III ("Johnnie"), and put his daughter, eight month-old Robin, into a freezer until she stopped crying.¹²⁶ The informant stated that John bit his wife's nose and left the house to retrieve a gun.¹²⁷ Edna and the children were placed in protective custody, but after an investigation by the Social Services Department, a judge told Edna to go home, work things out with John, and raise her family.¹²⁸

(emphasizing that spousal abuse continues "because the historical abuse of women is ingrained in contemporary social attitudes and reflected in institutional responses to battered women").

119. See Haddix, *supra* note 17, at 787 (asserting that children who grow-up witnessing domestic abuse are more likely to also suffer physical abuse and may remain a victim of abuse even after her abused spouse separates from the batterer).

120. 684 N.E. 2d 1311 (1997).

121. *See id.* at 1311.

122. *See id.*

123. *See id.* at 1317.

124. *See id.* at 1311.

125. *See id.* at 1313.

126. *See Engle*, 684 N.E.2d at 1313.

127. *See id.*

128. *See id.* By that time, Mrs. Engle attempted to file for divorce from her abusive husband but failed when her husband's sister falsely accused her of child neglect in order to ruin her efforts to return to her home state with the children. *See id.* Mrs. Engle had to remain in the state to go to court to answer the charge. *See id.*

Over the years, several other tragic events occurred. The couple's daughter, Robin, died at thirteen months from inhaling a bottle of pepper.¹²⁹ The child's father convinced police that the couple's son, who was just over two years old, poured the pepper down the baby's throat, but it was later revealed that the boy and his mother were asleep at the time of Robin's death.¹³⁰ In 1977, John frequently abused his second son, Timothy, claiming the boy was "retarded."¹³¹ The local child services agency received calls claiming Timothy had bruises.¹³² Timothy was taken away from the family and eventually adopted.¹³³ John later raped a second daughter, Angela, when she was fifteen years old.¹³⁴

Meanwhile, Edna was still being abused. In 1985, a caseworker visited the home and found Edna with two black eyes.¹³⁵ On at least one documented occasion, John told the children that their mother was a "slut and a whore."¹³⁶ Despite the abuse she endured, Edna tried to protect the children many times, but John would beat her for her attempts.¹³⁷ Although governmental agencies routinely interviewed the family, these interviews were always conducted in the family home,¹³⁸ a violent and non-neutral setting.¹³⁹ Edna and the children were simply too afraid to reveal the abuse.¹⁴⁰ As a result of Christopher's death, Edna was charged and plead guilty to murder and six counts of child endangerment among other charges.¹⁴¹ After extensively reviewing the family's history, the appeals court called the home a "horror chamber"¹⁴² and called John a "sociopathic drunk."¹⁴³ The Ohio Supreme Court reversed Edna's conviction, noting that she did not make her plea "knowingly or intelligently."¹⁴⁴ The court also pointed to Battered Woman's Syndrome as a

129. *See id.*

130. *See id.*

131. *See id.*

132. *See Engle*, 684 N.E.2d at 1313.

133. *See id.* at 1314.

134. *See id.* at 1315.

135. *See id.* at 1314.

136. *See id.* at 1315.

137. *See id.* at 1316.

138. *See Engle*, 684 N.E.2d at 1314.

139. *See id.* at 1315 (describing the non-neutral setting of the home).

140. *See id.* at 1314.

141. *See id.* at 1311 (entailing that Edna plead "no contest to one count each of murder, obstruction of justice, and theft, three counts of forgery, two counts of perjury and six counts of child endangering." (quoting *Ohio v. Engle*, 660 N.E.2d 450, 451 (Ohio 1996)).

142. *See id.* at 1316.

143. *See id.* at 1318.

144. *See Engle*, 684 N.E.2d at 1312.

reason for Edna's inability to leave John.¹⁴⁵ Edna was then given a new sentence.¹⁴⁶

As this case indicates, abuse of a child is not atypical when the child's mother is battered in the home. At least one estimate reveals that when children die of child abuse, seventy percent of their mothers are also victims of continuous violence.¹⁴⁷ Furthermore, fifty percent of those men who abuse their wives also abuse their children.¹⁴⁸ Some husbands who abuse their wives and children may feel they have a lawful right to do so.¹⁴⁹ Legal history in the United States has overwhelmingly given men the right to control their wives and children.¹⁵⁰ United States courts have methodically commented on and decided how severely a man may physi-

145. See *id.* at 1318 (asserting "Edna was genuinely suffering from battered woman syndrome" and is "borderline mentally retarded").

146. See *id.* at 1319 (revealing Edna was sentenced to a suspended sentence on the basis of manslaughter that was replaced by five years probation). Edna received ten suspended, concurrent one-year sentences for ten other counts. See *id.* These suspended sentences were also replaced with a consecutive five year probationary period. See *id.* Finally, the court gave Edna 57 months credit for time previously served under the murder conviction, in case she has reason to be incarcerated in the future. See *id.*

147. See Bonnie E. Rabin, *Violence Against Mothers Equals Violence Against Children: Understanding the Connections*, 58 ALB. L. REV. 1109, 1111 (1995) (revealing that in 70% of the cases where a child dies due to abuse, there is also evidence of ongoing abuse against the mother).

148. See Caroline W. Jacobus, *Legislative Response to Discrimination in Women's Health Care: A Report Prepared for the Commission to Study Sex Discrimination in the Statutes*, 16 WOMEN'S RTS. L. REP. 153, 224 (1995) (claiming studies reveal that "half the men who batter are reported to abuse their children").

149. See Ammons, *supra* note 111, at 64 (finding that the doctrine of coverture essentially made the husband and wife one entity, with the husband controlling the wife). Under the doctrine of coverture, a woman loses her legal status, or independence, and belongs to her husband. See *id.* Furthermore, a husband had a right to beat his wife and children so as to not "bring shame on the household." See *id.*; Adrienne D. Davis, *The Private Law Of Race And Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221, 232 n.28 (1999) (writing that coverture "gave husbands absolute ownership or daily control over their wives' property. . ."); Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1345-46 (1998) (emphasizing that under coverture, women had few rights and no legal identity apart from their husband). Additionally, children were subjected to their father's unrestricted control. See *id.*

150. See Amy L. Stewart, *Covenant Marriage: Legislating Family Values*, 32 IND. L. REV. 509, 509-10 (1999) (describing the historical view that men had the duty to "maintain a well-governed home" by controlling all the residents and property in the household thereby reducing women and children to subordinates); Audrey E. Stone & Karla M. Digirolama, *Battered Women's Expert Testimony, Past and Present*, 271 PLI/Est 181, 188 (1998) (revealing that "women have been perceived as inferior to men" since the dawn of time). Western civilization has historically promulgated laws which allow men to control and chastise (or physically abuse) women as if they were chattel. See *id.* Laws of the Roman Empire allowed men to use "reasonable physical force to discipline his wife, including blackening her eye or breaking her nose." See *id.* Furthermore, English laws

cally punish his wife and children, the reasons such "correction" might be necessary, and the proper instruments in a husband's arsenal.¹⁵¹ Although the United States purports to condemn child and wife abuse, given the country's history, many women and children are continuously subject to a husband's self-perceived right to be cruel and inhumane in the name of an invalid, archaic legal right once thought necessary to maintain order within the family.¹⁵²

Although there are numerous instances of intentional physical abuse, children may also be the victims of unintentional physical abuse. For example, the husband who beats his wife often does not take care to insure that their children are not present, or at least positioned at a safe distance from the place where the abuse is taking place.¹⁵³ Therefore, children may be unintentionally hit or harmed when they are between their mothers and the abuser during incidents of abuse, or while objects are being thrown.¹⁵⁴ Additionally, infants may be harmed if their mothers are holding them while the abuser attacks.¹⁵⁵

viewed rape not as a crime against women, but as a crime against that woman's husband, father, or fiancée for which he could be compensated. *See id.*

151. *See* Stone & Digirolama, *supra* note 150, at 188 (expounding that the "rule of thumb" was created by English common-law courts and later adopted in the United States in the 1800's). This rule allowed a husband to beat his wife with a "rod no thicker than his thumb." *See id.*; *see also*, James Martin Truss, *The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY'S L. J. 1149, 1151 (1995) (citing one court's characterization of domestic abuse as "trivial complaints").

152. *See* Pamela M. Macktaz, *Domestic Violence: A View from the Bench*, 6 MD. J. CONTEMP. LEGAL ISSUES 37, 38 (1995) (proposing that dominance is inherent "in the ancient law of 'coverture' and can be a source for oppression and domestic violence"). Under the doctrine of coverture, a man is given the power to control and domineer his wife under the notion that "the husband and the wife are one person in the law." *Id.* According to William Blackstone, since a husband must "answer for her misbehavior, the thought it reasonable to entrust him with this power of refraining her, by domestic chastisement." *Id.*

153. *See* Haddix, *supra* note 17, at 760 (asserting that every year, 3.3 million children, ranging in age from 3 to 17 years-old, witness domestic violence); Jacobus, *supra* note 148, at 224 (citing a New Jersey State Police Report which found that "children were involved in 9 percent (5,736) and were present in 42 percent (27,505) of domestic violence offenses in 1993").

154. *See* Haddix, *supra* note 17, at 788 (revealing that children may be harmed if they are "caught in the cross-fire" when their fathers are abusing their mothers). Children may be "hit, pushed, or dropped" during these attacks on their mother. *See id.* at 791.

155. *See* Leslie D. Johnson, *Caught in the Crossfire: Examining Legislative and Judicial Responses to the Forgotten Victims of Domestic Violence*, 22 LAW & PSYCHOL. REV. 271, 286 (1998) [hereinafter Johnson, *Caught in the Crossfire*] (purporting that children living in abusive environments suffer from a more "insidious form of child abuse" because they are likely to bear psychological scars from watching their father beat their mother); Schwaebler, *supra* note 63, at 141 (stating that the public is becoming increasingly aware

Undoubtedly, children who witness abuse suffer psychologically.¹⁵⁶ In addition to any physical abuse that may or may not be inflicted upon them, children who see their mothers beaten by a batterer become victims of intense emotional abuse as well.¹⁵⁷ Witnessing such abuse may have the same harmful effects as actual physical abuse of the child¹⁵⁸ or, arguably, worse effects. Not only may a child have reason to worry about her own safety, but she must also worry about the safety of her mother.¹⁵⁹ Abuse of a child, whether emotional or physical, detrimentally affects that child in the future. For example, a child who witnesses the beating of his mother may later become aggressive on his own.¹⁶⁰ Conversely, some children witnessing such abuse may become subservient in future relationships thereby subjecting themselves to future abuse.¹⁶¹ Others may continue the cycle of abuse after learning the only way to deal with their

that children witnessing domestic violence at home are suffering the same emotional effects as children who are themselves victims of physical abuse); *see also* Haddix, *supra* note 17, at 789 (asserting that children witnessing domestic violence “learn they become part of a dishonest conspiracy of silence” and “live in a world of make believe”).

156. *See* Haddix, *supra* note 17, at 789 (asserting that children witnessing domestic violence “learn they become part of a dishonest conspiracy of silence” and “live in a world of make believe”); Johnson, *Caught in the Crossfire*, *supra* note 155, at 286 (purporting that children living in abusive environments suffer emotional and psychological trauma from witnessing abuse); Schwaebler, *supra* note 63, at 141 (stating that the public is becoming increasingly aware that children witnessing domestic violence at home are suffering the same emotional effects as children who are themselves victims of physical abuse).

157. *See* Haddix, *supra* note 17, at 759 (stating that children who witness abuse suffer great emotional harm); Jacobus, *supra* note 148, at 224 (arguing that exposure to the “victimization of their mothers” subject children to “extreme emotional abuse.”).

158. *See* Haddix, *supra* note 17, at 759 (asserting that the emotional trauma the child is experiencing, as a result of watching their mother beaten, is similar to that trauma associated with actual physical child abuse); Rabin, *supra* note 147, at 1111 (stating “that children who witness domestic violence demonstrate the same symptoms as physically or sexually abused children”).

159. *See* Jacobus, *supra* note 148, at 224 (suggesting that a child who watches his or her mother abused may fear for the safety of himself and his mother).

160. *See id.* (claiming that the guilt and anger which builds from living in an abusive environment can “produce post-traumatic stress disorder in children as well as externalized aggressive and delinquent behaviors”).

161. *See* Haddix, *supra* note 17, at 149 (demonstrating that a significant number of women who become victims of domestic violence witnessed violence in their childhood home); *see also* Pauline Quirion et al., *Protecting Children Exposed to Domestic Violence in Contested Custody and Visitation Litigation*, 6 B.U. PUB. INT. L.J. 501, 511 (1997) [hereinafter Quirion et al., *Protecting Children*] (explaining that girls witnessing domestic violence tend to become withdrawn, clingy, and dependent); Patricia K. Susi, *The Forgotten Victims*, 54 J. Mo. B., Sept.-Oct. 1998, at 231, 234 (asserting that a child exposed to domestic violence learns, from her parents, that behavior is acceptable which perpetuates a never ending cycle of abuse from one generation to the next). *But see The Dynamics of Domestic Violence*, *supra* note 117 (claiming that there is not typical batterer profile and that “domestic violence is under the control of the perpetrator, not the victim”).

aggression is through violence.¹⁶² These reactions perpetuate the cycle of domestic abuse in future generations.

E. *Help for Battered U.S. Citizen Women*

Fortunately, there are facilities, agencies, and organizations available to assist battered women. These include crisis intervention centers, local police departments, private organizations, churches, clinics, and the National Domestic Violence Hotline.¹⁶³ Organizations such as these provide, or lead women, to food, shelter, medical care, and legal assistance. Such services are usually available free of charge or at very lost costs.¹⁶⁴

Unfortunately, although resources are available, they are scarce. Currently the number of battered women's shelters is insufficient to provide for all who need help.¹⁶⁵ Shelters are often overcrowded and unable to

162. See Haddix, *supra* note 17, at 790-91 (showing that adult sons, who watched their fathers batter, demonstrate a sizeable increase in battering their partners than adult sons of men who did not batter). Male children, who see domestic violence growing-up, have a three times higher probability that they will abuse their partners. See *id.*; Quirion et al., *Protecting Children*, *supra* note 161, at 511 (emphasizing that boys who witness the abuse of their mother, by their fathers, tend to, be disobedient, defiant and destructive and also may abuse their mother and other siblings as a result).

163. See Family Violence Prevention and Services Act § 110, 42 U.S.C. §§ 10401-10418 (1994) (providing federal funds to state programs to increase public awareness of and fight domestic violence). The purpose of the Family Violence and Prevention Services Act is:

- (1) assist the states in efforts to increase public awareness about and prevent family violence and to provide immediate shelter and related assistance for victims of family violence and their dependents; and
- (2) provide for technical assistance and training relating to family violence programs to States, local public agencies (including law enforcement agencies, courts, legal, social services, and health care professionals), nonprofit private organizations, and other persons seeking such assistance.

Id.; see also Mason, *supra* note 10, at 637 (discussing federal funds supplied for state programs to fight domestic violence including battered women's shelters, a battered women's hotline, increased and stronger law enforcement, and legal advocacy); Weiner, *supra* note 25, at 277 (reporting that contributions from private citizens, churches, private organizations, and businesses make a battered woman's shelter in Virginia possible).

164. See *Directory of Immigrant Legal Services Programs*, LEGAL REMEDIES FOR BATTERED IMMIGRANT WOMEN (Crim. Just. Div. of the Governor's Office, Austin, Tex.), May 20, 1998, at 409-30 (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (giving examples of different phone numbers and organizations women can turn to for help).

165. See Eugene Brown, Family Violence Prevention Services, Address at St. Mary's Center for Legal and Social Justice, (Sept. 18, 1998) (stating that Texas has more animal shelters than battered women's shelters).

accommodate everyone who comes to their doors.¹⁶⁶ Such overcrowding may be due to a lack of funding or, sadly, may simply be a reflection of society's ignorance or denial of such a prevalent problem.¹⁶⁷

V. IMMIGRANT BATTERED WOMEN—A MOTHER'S CHOICE

Despite the hardships faced by U.S. citizen battered women, the plight of the immigrant battered woman is arguably worse. Today, there is an intense anti-immigrant feeling in the United States.¹⁶⁸ For example, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 allowed states to limit the amount of public assistance or welfare which immigrants are available to receive.¹⁶⁹ In addition, the Illegal Im-

166. See *Developments*, *supra* note 24, at 1528 (reporting that as a result of restricted fiscal freedom, overcrowding causes some jurisdictions have to turn women down when they seek help from a shelter); Gretchen P. Mullins, *The Battered Woman and Homelessness*, 3 J.L. & POL'Y 237, 244-45 (1994) (indicating that due to decreased federal funding women have been frequently denied help from emergency shelters because of overcrowding and that more women are likely to return to their abusive partners as a result of the scarcity of these shelters).

167. See Jacobus, *supra* note 148, at 227 (finding that funding has been denied to women when they are victims of only domestic violence to provide for programs which house both domestic violence victims and the general homeless population, and concluding that this fails to meet the specialized needs of domestic violence victims); Georgia Wralstad Ulmschneider, *Rape and Battered Women's Self-Defense Trials As "Political Trials": New Perspective on Feminist's Legal Reform Efforts and Traditional "Political Trials" Concept*, 29 SUFFOLK U. L. REV. 85, 90-91 (1995) (explaining that "police, prosecutors, and society discouraged battered women . . . from bringing charges against their assailants" as these entities have generally viewed violence in the home as a private, personal problem); Renee M. Yoshimura, *Empowering Battered Women Changes in Domestic Violence Laws in Hawaii*, 17 U. HAW. L. REV. 575, 592 n.130 (1995) (exploring the choices battered women have if a shelter is overcrowded she may have to leave before she is ready, to provide room for someone else, or shelter may pay for hotel accommodations for the woman by "dipping into already inadequate funds").

168. See Franco, *supra* note 2, at 101 (describing the "resurgent xenophobia" which has caused immigrants to further retreat from mainstream American society and citing California's Proposition 187, which seeks to deny immigrants many benefits, as representative of American's sentiment towards immigrants).

169. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, Aug. 22, 1996, 110 Stat. 2105. But see Carol Leslie Wolchok, *Demands and Anxiety: The Effects of the New Immigration Law*, HUM. RTS., Spring 1997 (1997) (citing the Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193 and claims the law "eliminates a vital safety net for legal immigrants and refugees"); L. Tracy Harris, *Conflict or Double Deterrence? FLSA Protection of Illegal Aliens and the Immigration Reform and Control Act*, 72 MINN. L. REV. 900, 903 (1988) (arguing that immigrant do have some rights and showing that the U.S. Supreme Court held that Due Process "does not solely apply to United States citizens"). The comment goes on to state the "Court affirmed that these rights [due process and equal protection] apply even to those aliens whose presence in this country is unlawful, involuntary, or transitory." (citing *Wong Yang Sung v. McGrath*, 339 U.S. 33, 48-51).

migration Reform and Immigrant Responsibility Act¹⁷⁰ has increased funding for border patrol personnel and instituted stricter penalties for those who “smuggle” aliens into the country and use fraudulent documents.¹⁷¹

Before the enactment of these laws, illegal immigrants were still unable to obtain aid under most major welfare programs.¹⁷² These new acts have succeeded in making a difficult situation much worse. Undocumented immigrant battered women are often unable to take advantage of the resources available to citizen battered women.¹⁷³ An immigrant may be turned away from shelters due to no income or ineligibility for public aid.¹⁷⁴ Organizations that receive federal funds may not accept illegal

170. See Illegal Immigration Reform & Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996); see also David Grunblatt & Philip J. Kleiner, *The U.S. Nonimmigrant Visa System*, 1001 PLI/CORP 83, 113 (1997) (citing that President Clinton signed the Illegal Immigration Reform & Immigrant Responsibility Act of 1996 into law on September 30, 1996). The Illegal Immigration Reform & Immigrant Responsibility Act is viewed as “one of the strictest immigration measures of all times.” *Id.* The law focuses on “exclusion, deportation, . . . removal, . . . enhanced border enforcement, summary exclusion, and increased workplace monitoring. . . .” *Id.*; see also 142 CONG. REC. H9392 (daily ed., July 31, 1996) (statement of Rep. Bilirakis). Representative Michael Bilirakis from Florida, Chairman of the House Health and Environment Subcommittee expressed his feelings towards undocumented immigrants when he stated:

Let me speak for a moment about illegal aliens. Illegal immigration is breaking our treasury, burdening California, and trying America's patience. It is wrong for our welfare system to provide lavish benefits for persons in America violating our laws. I am proud that the Personal Responsibility and Work Opportunity Act ends welfare for illegal aliens. It ends eligibility for Government programs for illegal aliens. It ends the taxpayer-funded red carpet for illegal aliens. Our plan is to send a clear message to those who jump our borders, violate our laws, and reside in America illegally: Go home.

Id.

171. See Kelly Kaiser, *A Lawyer's Guide: How to Avoid Pitfalls When Dealing with Alien Clients*, 86 KY. L.J. 1183, 1185 (1998) (describing IIRIRA and noting “increased penalties for alien smuggling and fraudulent documentation”).

172. See Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights and Alienage Classifications*, 35 VA. J. INT'L L. 217, 227-30 (1994) (discussing the small impact undocumented immigrants have on welfare programs); see also Alison Fee, Note, *Forbidding States from Providing Essential Social Services to Illegal Immigrants: The Constitutionality of Recent Federal Action*, 7 B.U. PUB. INT. L.J. 93, 107 (1998) (discussing the myths surrounding the use of social services by illegal immigrants).

173. See Orloff, *supra* note 55, at 1030 (proclaiming that even though undocumented immigrant parents may apply for “food stamps, SSI, and Medicaid” for their U.S. citizen children, the funds available for these parents, through these programs, are less than those funds available to a citizen parent). Battered immigrants are not categorically ineligible for public benefits. See *id.* at 1029.

174. See Loke, *supra* note 11, at 592 (noting that some shelters offer only a limited number of spots, hoping that a smaller number of women will make better use of shelter services).

immigrants into their programs.¹⁷⁵ Some shelter directors feel that since immigrants cannot speak English, or are ineligible for various social service programs, they are unable to take full advantage of shelter space and resources.¹⁷⁶ Even if the immigrant is not barred from the shelter, due to either federal rules regarding funding or the policy of the shelter, many shelters do not have a bilingual staff.¹⁷⁷ In those shelters where an interpreter is available, the immigrant may still fear exposure, which will prevent her from asking for help.¹⁷⁸ She may fear a lack of confidentiality, as well as the insecurity that the shelter will notify her abuser.¹⁷⁹ As a

175. See Ingrid V. Eagly, *Community Education: Creating a New Vision of Legal Services Practice*, 4 CLINICAL L. REV. 433, 439-40 (1998) (stating that 1995 budget cuts limited various programs which were geared to represent immigrants); Rebecca S. Engrav, Cal WORKS: *California's Response to Welfare Reform*, 13 BERKELEY WOMEN'S L.J. 268, 280 (1998) (predicting that the complete loss of food stamps for immigrants in the year 2000, will have a detrimental impact on those immigrant women who formerly received AFDC); Steven Epstein et al., *The Future of Legal Services: Legal and Ethical Implications of the LSC Restrictions*, 25 FORDHAM URB. L. J. 279, 280 (1998) (declaring that Congress' cuts in funding restrict legal representation of immigrants); Margaret M.R. O'Herron, *Ending the Abuse of the Marriage Fraud Act*, 7 GEO. IMMIGR. L.J. 549, 556 (1993) (arguing that immigrant women usually do not obtain the services they need). Federally funded legal representation or shelter for immigrant women rarely exist. Even if these services were available, the immigrant's acceptance of public aid might categorize her as a "public charge" which may deem her deportable pursuant to current immigration laws. See *id.*; Margaret Ann Shannon, Recent Statute, *Public Assistance: Repeal "Aid to Dependent Children Act," Create "Temporary Assistance for Needy Families Act,"* 14 GA. ST. U. L. REV. 284, 297-98 (1997) (explaining that the state of Georgia limited welfare assistance to illegal aliens in part because the state received "no federal monies for aliens, its not part of the block grant, and all assistance will come strictly from state funds).

176. See Loke, *supra* note 11, at 592 (pointing out that immigrant women attempting to locate help or shelter, often face language barriers). Battered women's shelters often do not have staff that can speak the immigrant's native language or shelters may not want to provide the immigrant with services because they wish to preserve those resources for women who can use them better. See *id.* Also, government funding restrictions against admission of immigrants to these shelters further curtails an immigrant woman's opportunities to seek aid. See *id.*; Pressman, *supra* note 27, at 136 (acknowledging that many shelters do not have personnel who speak foreign languages and that even if interpreters are available, an immigrant woman may be reluctant to reveal the circumstances of her abuse because she fears the shelter may inform her abuser of her whereabouts).

177. See Loke, *supra* note 11, at 592 (noting that most shelters cannot accept women who do not speak English because of the lack of bilingual staff).

178. See *id.* (asserting that although shelters may employ bilingual or multilingual interpreters, immigrants may still be afraid to speak with them). Immigrant women may "fear exposure, lack of confidentiality, and fear that their whereabouts may be disclosed to abusive spouses. See *id.*

179. See *id.* (acknowledging that immigrants may not want to seek aid from a shelter because of the fear that shelter workers will disclose their whereabouts to their abusers).

result, the number of places to which a battered immigrant may turn are extremely limited.¹⁸⁰

Furthermore, immigrant women may encounter significant problems when attempting to find a job. Employers face great sanctions if they hire undocumented aliens or immigrants who are documented but unauthorized to work.¹⁸¹ This inability to obtain work, or at least adequate work, makes leaving the batterer even more difficult for an immigrant woman because she has no way of supporting herself and her children.

In addition, battered immigrants are living in a country foreign both in place and custom. Cultural mores may prevent women from ending their abusive relationships.¹⁸² The immigrant may come from a country that accepts spousal abuse as a cultural norm,¹⁸³ where it is considered a private matter.¹⁸⁴ She may believe domestic violence is accepted in the United States as it is in her country. However, even if some battered immigrant women know that the United States prosecutes acts of vio-

180. *But see* Franco, *supra* note 2, at 133 n.186 (illustrating how many shelters will help local immigrants with community outreach programs which employ multi-lingual and multi-cultural staff). Some battered women's shelters gear their services toward immigrants by focusing on long-range issues such as legal aide for divorce, child custody, emotional counseling, and financial assistance. *See id.* Other shelters may ease the immigrants transition into the United States by providing English classes and other educational programs. *See id.*

181. *See* Colleen V. Thouez, *New Directions in Refugee Protection*, FLETCHER F. WORLD AFF., Fall 1998, at 89, 94 (citing the Immigration Reform and Control Act of 1986 (IRCA) as the legislation which "threatened stiff penalties for employers who hired illegal immigrants"); *see also* Arthur A. Baer, *Latino Human Rights and the Global Economic Order*, 18 CHICANO-LATINO L. REV. 80, 100 (1996) (reporting that the IRCA restriction against hiring illegal immigrants has caused employers to discriminate against legal residents or citizens who "look or sound foreign" including Latinos and Asians). Anglos received fifty-two percent more offers of employment than "Hispanic U.S. citizens who were equally qualified." *See id.* at 101; Sarah M. Kendall, *America's Minorities Are Shown the "Back Door" . . . Again: The Discriminatory Impact of the Immigration Reform and Control Act*, 18 Hous. J. INT'L L. 899, 900 (1996) (describing a goal of the IRCA: "to control the huge number of illegal immigrants flooding into the United States by reducing opportunities for employment and to secure our national borders"). To control the number of immigrants entering the United States, Congress, through IRCA, imposed penalties on employers who hired or recruited undocumented workers. *See id.* *But see* Jenny Schulz, *Grappling With a Meaty Issue: IIRIRA's Effect on Immigrants in the Meat Packing Industry*, 2 J. GENDER RACE & JUST. 137, 157 (1998) (claiming that loopholes in the law make it easy for employers to avoid sanctions).

182. *See* Loke, *supra* note 11, at 590 (discussing "cultural barriers [which] present a major obstacle to a battered woman, often preventing her from seeking help").

183. *See* Clemencia Prieto, S.A.P.D. Victim's Advocacy Section, Address at the St. Mary's Center for Legal and Social Justice, (Sept. 18, 1998) [hereinafter Address by Clemencia Prieto].

184. *See* Loke, *supra* note 11, at 590 (noting marriage is a "'private' problem" in many societies).

lence in the home, many of them have lived for so long in a culture that undervalues its women, that they have come to believe that it is their duty to endure abuse from their husbands.¹⁸⁵ Therefore, any discussion of the abuse, whether to family members or strangers, may bring shame and disgrace to the victim.¹⁸⁶

Social status is another important factor to consider. A woman may not want to risk her husband's standing in the community by revealing that he has abused her.¹⁸⁷ Such a revelation may bring dishonor to the family, or to her husband individually, thereby reducing his standing in the community.¹⁸⁸ Furthermore, if a woman exposes her husband's abuse of her, she often suffers severe social consequences in her culture, such as rejection from her own family.¹⁸⁹

Religion may also play an important part. In most cultures, religious beliefs are extremely important. Some cultures may follow religions which may cause a battered woman to believe she has a duty to withstand or tolerate violence simply because she is married to her abuser.¹⁹⁰ For example, many Asian cultures subscribing to Confucianism demand that women obey their husbands, while Buddhist women believe that victimi-

185. See Patricia M. Wald, *Some Unsolicited Advice to My Friends in Eastern Europe*, 46 SMU L. REV. 557, 577 (1992) (asserting women in less developed countries are "more powerless, and more subjugated than in developed countries"). Additionally, cultural roles inhibit women freedom. See *id.*; see also Address by Clemencia Prieto, *supra* note 183 (describing a trip to Central America where she observed a man beating his wife profusely; after attempting to stop the man, Prieto was surprised that the batterer did not protest to her intervention as vehemently as his victim). In the address, Prieto described how the abused woman angrily told the advocate that her husband had a right to discipline his wife as he saw fit. See *id.* Reluctantly, the advocate was forced to leave the situation as she found it. See *id.*

186. See Loke, *supra* note 11, at 590 (arguing that discussing "private affairs" either with family or strangers "is a source of shame and family disgrace").

187. See Loke, *supra* note 11, at 590-91 (providing that if a woman in another culture objects to the abuse, she may refrain from revealing it for fear of jeopardizing her husband's standing in the community since social status holds great importance); see also Lilienthal, *supra* note 12, at 1604 (revealing that in some cultures discussing spousal abuse in public "brings shame and disgrace to the family"); O'Herron, *supra* note 175, at 559 (echoing that some cultures view domestic violence as a private matter and discussion of such matters is shameful and disgraceful on the entire family).

188. See O'Herron, *supra* note 175, at 559 (showing that in the Asian culture, woman may face rejection from her own parents if she leaves her husband); see also Loke, *supra* note 11, at 591 (warning that immigrant women may face sever social consequences when seeking a divorce because some families and communities reject women who have divorced or separated from their husbands).

189. See Loke, *supra* note 11, at 590 (calling domestic violence private and asserting discussion could shame the family).

190. See *id.* at 590 (asserting immigrant women may have live in cultures whose religion requires women to obey their husbands and accept and endure abuse).

zation is an inherent part of their fates.¹⁹¹ Such strong and institutionalized beliefs create difficult barriers for women to ignore when deciding whether or not reveal the abuse.¹⁹²

Immigrant womens' attitudes toward police may also present some problems. Battered immigrant women may hesitate when seeking help from the police because of their own view of the police and authorities in their own country. Some immigrants come from countries with repressive police forces.¹⁹³ Since these immigrant women have lived in a society where the police are largely feared, they have difficulty seeking aid from the police or other governmental agencies. Battered women fear intense and intrusive questioning¹⁹⁴ about matters that they consider extremely personal, such as marriage and abuse. Negative feelings regarding the court system in their home country also causes reluctance in attaining protective orders against the abuser.¹⁹⁵

Such fear of the government, or its agencies, makes the immigrant's chance of getting help virtually impossible.¹⁹⁶ The women are forced to choose between the lesser of two evils. One choice is to stay with the

191. See *id.* at 589-90 (describing a Korean saying which states "women and dried fish . . . alike . . . you have to beat them at least once a day to keep them good"). Both the Koran and Islamic law dictate that men are in charge of women because Allah, religion's god-like deity, made one of them [men] to excel over the other because men support their women by spending their property. See *id.* The Koran goes on to state good women are obedient, while men should admonish rebellious women and banish them to bed. See *id.*

192. See Loke, *supra* note 11, at 589.

193. See generally Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231, 245 n.78 (1994) (stating that abuse by the government, police, and the military is a common factor in Latin American heritage). Latin Americans may travel to the United States to seek refuge from authoritative abuse. See *id.* However, these immigrants still retain their suspicious and fearful views of authority and transfer those views to American government and police. See *id.*; see also Sally J. Greenberg, *The Massachusetts Hate Crime Reporting Act of 1990: Great Expectations Yet Unfulfilled?*, 31 NEW ENG. L. REV. 103, 130 (1996) (arguing that Asian immigrants may fear U.S. and state government agencies and officials because many Asian immigrants believe police are "corrupt and dangerous," as were the police in their home country).

194. See Carroll, *supra* note 70, at 803-04 (stating that "police officers and prosecutors will subject . . . female victims to intense personal questioning . . . judge may impugn the character of these women [domestic violence and rape victims] by suggesting that they asked for it . . . jury will scrutinize their every gesture and inflection to gage their credibility").

195. See Loke, *supra* note 11, at 592 (stating that women are reluctant to approach the police because of their native country's repressive legal system).

196. See Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 413 (1995) (expressing that immigrants are terrified of seeking help of the government due to factors such as fear of deportation). But see Fee, *supra* note 172, at 110-11 (describing Limited Cooperation laws which enable police to respond to needs of immigrants without worrying

batterer and endure the abuse, undocumented and with little or no rights. The other alternative is to leave the abuser and seek the help of the police; a police that she fears. Even if the immigrant chooses the latter alternative, she still faces other obstacles. For example, if the immigrant woman's husband is not a citizen, but a legal permanent resident, problems may arise for the battered immigrant if she files criminal charges against her husband. In this type of situation, an immigrant wife is depending on her husband's legal status to petition for her own legal residency in the United States.¹⁹⁷ Any criminal charges filed against the husband may threaten his own status, and destroy the wife's ability to either continue her petition or self-petition.¹⁹⁸ Furthermore, the police may have no choice but to report the abused immigrant to the INS.¹⁹⁹ Although society seemingly encourages women to report domestic violence,²⁰⁰ the battered immigrant faces possible deportation if she does so.

about enforcing federal immigration laws or statutes). Limited cooperation laws help maintain trust between immigrant communities and police departments. *See id.*

197. *See* Loke, *supra* note 11, at 594 (writing that Congress passed the Immigration Marriage Fraud Amendments (IMFA) in 1986 in response to concerns for sham marriages). The IMFA mandates that the citizen or legal permanent resident spouse of an immigrant must petition an initial two-year period of conditional residency for his/her spouse. *See id.* Then, legal permanent residency for the immigrant spouse may be obtained only if the immigrant and the citizen/legal permanent resident spouse, jointly petition for adjustment of the conditional residency status. *See id.* If the couple does not petition jointly, or the couple divorces, the immigrant spouse is immediately subject to deportation. *See id.*; *see also* James A. Jones, *The Immigration Marriage Fraud Amendments: Sham Marriages or Shame Legislation?*, 24 FLA. ST. U. L. REV. 679, 686 (1997) (clarifying that the granting of a battered spouse waiver is at the discretion of the Immigration and Naturalization Service).

198. *See* Cecelia M. Espenozo, *Crimes of Violence by Non-Citizens and the Immigration Consequences*, COLO. LAW, Oct. 26, 1997, at 90 (revealing that criminal proceedings against a legal permanent resident batterer may adversely affect the immigrant spouse's petition for legal residency). The immigrant spouse is abusing her right to apply for residency on her abuser's legal right to remain in the United States. *See id.* A domestic violence conviction may result in the batterer's deportation. *See id.* If the abuser loses his right to remain in the U.S., the battered immigrant may lose her basis for submitting a petition for residency. *See id.*

199. *See* LEGOMSKY, *supra* note 1.

200. *See generally* Makar, *supra* note 79, at 18 (summarizing that California law requires that incidents of domestic violence must be immediately reported to police officials). The state of California requires that doctors and surgeons specifically write in patients' files the names of those that are or may be responsible for "inflicting the wound, other physical injury, or assaultive or abusive conduct upon the person." *Id.* The law also encourages doctors to direct the victim to local domestic violence services. *See id.* *But see* Michelle J. Mandel, *Ensuring That Victims of Domestic Abuse Are Not Discriminated Against in the Insurance Industry*, 29 McGEORGE L. REV. 677, 685 (1998) (asserting that insurance companies use domestic violence as a criteria in determining whether to insure a

The fear of removal is the single largest concern for battered immigrants who would like to end their abusive relationships.²⁰¹ Removal may result in returning to more oppressive conditions than the immigrant is facing with her abuser.²⁰² In some instances, if a woman is sent back to her country, she may face prison, torture, or even death.²⁰³ Other women may return to undesirable conditions, such as poverty, illness, or a severe lack of opportunity.²⁰⁴ Additionally, the battered immigrant may not be the only one who suffers if she is removed. Many immigrants come to the United States to earn money for their relatives at home.²⁰⁵ Removal could devastate the immigrant's financial stability in the United States, and her family's in her home country.

Unfortunately, obtaining work may be difficult for an immigrant. Many immigrants are likely to be unemployed or unemployable.²⁰⁶ A

person which may discourage women from seeking medical help for their injuries or reporting the abuser to authorities).

201. See Loke, *supra* note 11, at 589 (indicating battered immigrant women remain in violent relationships because they fear deportation).

202. See Kelly, *Stories from the Front*, *supra* note 13, at 697 (analogizing the concerns of VAWA women to that of refugees); see also Joan R. Tarpley, *Bad Witches: A Cut on the Clitoris with the Instruments of Institutional Power and Politics*, 100 W. VA. L. REV. 297, 302 (1997) (providing that some immigrant women may be forced to endure female genital mutilation if they return to their countries of origin).

203. See Loke, *supra* note 11, at 591 (stressing that some women have escaped life-threatening situations in homeland). If these women are deported back to these countries, they may face imprisonment, torture, or death. See *id.* Other women may be forced to contend with disease, poverty, or lack of opportunity. See *id.*; Roy, *supra* note 13 at 269 (explaining that because many women have "fled unbearable conditions in their home countries" they would rather risk death than returning).

204. See Loke, *supra* note 11, at 591 (describing the life battered women lead in their home countries).

205. See Rajeev Saxena, Note & Comment, *Cyberlaundering: The Next Step for Money Launderers*, 10 ST. THOMAS L. REV. 685, 696 (1998) (acknowledging that immigrants make use of currency exchange facilities to send money to relatives in their home country); Katherine Tonnas, Comment, *Out of a Far Country: The Sojourns of Cubans, Vietnamese, Haitians, and Chinese to America*, 20 S.U. L. REV. 295, 394 (1993) (describing a process whereby a family will contribute to a fund to finance a trip for one family member to the United States).

206. See Raquel Pinderhughes, *Economic and Social Inequality in San Francisco: A Case Study of Environmental Risks in the City's Mission District*, 3 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 429, 431 (1996) (elaborating that many Latino immigrants have limited job opportunities due to "language barriers, lack of skills or experience"). Opportunities for Latino immigrants are further limited because of discrimination and immigration status. See *id.*; see also William W. Goldsmith, *Fishing Bodies Out of the River: Can Universities Help Troubled Neighborhoods?*, 30 CONN. L. REV. 1205, 1238 (1998) (citing racial, economic, and employment discrimination aimed at groups such as recent immigrants); Victor C. Romero, *Equal Protection Held Hostage: Ransoming the Constitutionality of the Hostage Taking Act*, 91 NW. U. L. REV. 573, 601 n.158 (1997) (suggesting that constructing

lack of education and employment skills may bar immigrants from finding work or adequate work.²⁰⁷ In addition, the inability to speak English greatly diminishes the immigrant's hope of finding a job.²⁰⁸ Even if the immigrant is skilled, employers often face sanctions for hiring or recruiting aliens who are unauthorized to work in the United States.²⁰⁹ Employers who violate laws which forbid the employment of aliens without a work permit may face both civil and criminal fines and penalties.²¹⁰

Job opportunities for immigrants are therefore curtailed. If an immigrant does find work, she will probably be paid less than the minimum wage with little or no benefits.²¹¹ Immigrants in these situations are sometimes forced to endure sub-standard working conditions,²¹² and the

barriers against immigrants seeking training or work will not alleviate joblessness for other workers).

207. See Hernandez-Truyol, *supra* note 72, at 366-67 (addressing the fact that undocumented Latinas usually have only low-skill, low paying jobs available to them). These jobs usually include childcare, house-cleaning, and work in garment shops. See *id.* at 367. Job security or other protections are usually non-existent. See *id.*; see also Augustus F. Hawkins, *Becoming Preeminent in Education: America's Greatest Challenge*, 14 HARV. J.L. & PUB. POL'Y 367, 369 (1991) (claiming there is an emerging underclass of underemployed people, which include immigrants who have come from countries with "weak educational and economic systems"); Elizabeth Kolby, Comment, *Moral Responsibility to Filipino Amerasians: Potential Immigration and Child Support Alternatives*, 2 ASIAN L.J. 61, 77 n.128 (1995) (contending that immigrants with more education and skills are in a better position to fully enhance their economic well-being).

208. See Loke, *supra* note 11, at 593.

209. See Harris, *supra* note 169, at 900 (stating that the Immigration and Nationality Act did not prohibit employers from hiring illegal aliens before the passage of the Immigration Reform and Control Act of 1986 (IRCA)). Under the IRCA, hiring illegal or undocumented immigrants is a crime. See *id.* This shows increasing difficulties and lack of opportunities some immigrant women may face in finding a job. See *id.*

210. See IMMIGRATION AND ILLEGAL ALIENS BURDEN OR BLESSING at 41, 45 (Alison Landes et al., eds. 1995) (explaining that the Immigration Reform and Control Act (IRCA) of 1986 allowed the government to penalize employers who hire those immigrants they know are undocumented). First offense violators are subject to a \$250-\$2000 fine for each unauthorized alien employed. Second offense fines range from \$2,000-\$5,000. Fines past the second offense may result in dollar amounts from \$3,000-\$10,000 for each alien. If a pattern of offenses is discovered, the employer may be fined and sentenced up to 6 months in jail. See *id.* at 45.

211. See generally Hernandez-Truyol, *supra* note 72, at 367 (asserting that "if one looks at working Latinas between ages eighteen and sixty-four, approximately half are immigrants . . . for undocumented Latinas, the available jobs are only in the low-skill, low-pay categories"); Ina M. Minjarez, *Unraveling the Cloth That Binds Latina Garment Workers in Texas: A Critical Analysis of the Texas Day Act*, 1 THE SCHOLAR: ST. MARY'S L. REV. ON MINORITY ISSUES (forthcoming Spring 1999).

212. See Loke, *supra* note 11, at 608 (reporting that without authorization to work, immigrant women are often forced to take "under the table" jobs). Illegal jobs are often characterized by low wages, bad working conditions, and no benefits. See *id.*; see also Diana Vellos, *Immigrant Latina Domestic Workers and Sexual Harassment*, 5 AM. U.J. GEN.

security of such jobs are by no means guaranteed.²¹³ Such dismal employment opportunities may cause the immigrant's dependence on her husband to become even greater. Since there are times when the abuser is also supporting the immigrant's family, the decision to leave becomes even more difficult and improbable. If the batterer is the family's major source of income, not only is the battered immigrant risking her financial stability by leaving him, she is risking the stability and well-being of her relatives as well.²¹⁴ Therefore, a battered immigrant may stay in a dangerous relationship to avoid poverty for both herself and her children²¹⁵ and possibly her family in her home country.

The decision to leave is further complicated if the abuser uses his ability to petition for residency as a way to control the immigrant.²¹⁶ Although a batterer may make promises, he often does not initiate the petitioning process needed to obtain his wife's legal residency status.²¹⁷

DER & L. 407, 420 (1997) (citing that undocumented immigrant women often are forced to take jobs where conditions and wages are much worse than those available for non-immigrants). Cf. Chris R. Tijima, *The Era of Re-Construction: Reclaiming the Politics of Asian Pacific American Identity and Reflections on the Critique of the Black/White Paradigm*, 29 COLUM. HUM. RTS. L. REV. 47, 64 n.54 (1997) (revealing how female Asian immigrants aided female Mexican workers by documenting "exploitative working conditions" in San Diego).

213. See Lamar Smith & Edward R. Grant, *Immigration Reform: Seeking the Right Reasons*, 28 ST. MARY'S L.J. 883, 923 (1997) (noting that job security for immigrants is unstable).

214. See generally, Loke, *supra* note 11, at 593 (explaining "immigrant women are often unemployed and have little social mobility").

215. See *id.* at 592 (asserting battered immigrant women may not know how to apply for services and may remain within her ethnic community where she is more likely to get a job, but less likely to leave her abuser).

216. See Stacy Brutin, *Images of Women in the U.S. Immigration Policy—The Paradox of Domestic Violence*, 88 AM. SOC'Y INT'L L. PROC. 454, 455 (1994) (detailing that laws have treated women as if they were property of men). Immigration law has embraced the notion of coverture because an immigrant woman lacks legal status without the aid of her husband. See *id.* See also Loke, *supra* note 11, at 591 (commenting that the fear of deportation uniquely complicates the lives of battered immigrant women). Immigrant women may fear deportation from this country regardless of whether they entered into a good faith marriage or not. See *id.* This fear prevents immigrant battered women from leaving their abusive citizen or legal resident spouses partly because they do not know there are ways to stop the abuse without risking their immigrant status. See *id.*

217. See Colloquy, *Are International Institutions Doing Their Job?, Violence Against Women and the U.S. Immigration Laws*, 90 AM. SOC'Y INT'L L. PROC. 616, 621 (1996) (elaborating that immigrants who never obtained conditional status, for which their citizen spouses had to apply, face greater difficulties and are still controlled by the threat of deportation); Linda Kelly, *Domestic Violence Survivors: Surviving the Beatings of 1996*, 11 GEO. IMMIGR. L.J. 303, 312-13 (1997) [hereinafter Kelly, *Surviving the Beatings*] (noting that in 1990, the domestic violence waiver to the requirement that a citizen and immigrant spouse must file jointly for adjustment of the immigrant's conditional status is not available for an

If the petition is never started and the batterer becomes unhappy with the marriage, ending the relationship may be as easy as reporting his wife to the INS.²¹⁸ On the other hand, the batterer may start the process, but threaten to withdraw the petition if he tires of, or becomes angry with, his wife.²¹⁹ Finally, batterers may misinform their victims of their rights or the status of their cases.²²⁰ All of these tactics are attempts to keep the immigrant with the batterer and to ensure he maintains control of the relationship.²²¹

Since all batterers assert control over their victims, immigrant battered women and citizen battered women often have some common needs. For instance, both immigrant and citizen battered women often need financial support, housing, legal counseling, emotional counseling, child care, and

immigrant unless her husband begins the initial conditional residency proceedings for his wife). *But see* Mason, *supra* note 10, at 658 (establishing that the Immigration Act of 1990 gives immigrant women a battered spouse waiver if they already have conditional status).

218. *See* Franco, *supra* note 2, at 136 (sharing the story of an immigrant named Carmen to illustrate how U.S. citizen batterers may use their right to petition for their immigrant wives' legal status as a pawn against them in obtaining access to their children). Carmen begged her husband to discontinue petitioning for her residency status. *See id.* Carmen's husband agreed he would reinstate the petition if Carmen would give up custody to the couple's daughter. *See id.* She refused to do so and lost her legal status. *See id.* *See also* *The Intersection of Domestic Violence and Immigration Concerns*, LEGAL REMEDIES FOR BATTERED IMMIGRANTS (Crim. Just. Div. of the Governor's Office, Austin, Tex.) May 20, 1998, at 311 (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (detailing that a citizen husband might threaten to have his immigrant wife "deported; refuse to file papers unless she fulfills his demands; have her sent back to her country if she leaves him; and/or withdraw her petition if she reports the abuse").

219. *See id.* at 311 (stating that a husband may threaten to withdraw his petition or send his wife back to her country of origin if she displeases him, reports the abuse, or attempts to leave him).

220. *See* Kimberle Williams Crenshaw, *Panel Presentation on Cultural Battery*, 25 U. Tol. L. Rev. 891, 894 (1995) (explaining that immigrant women are "vulnerable to spousal violence because so many have to depend on their husbands for information regarding their legal status"). Women who are permanent residents may stay in an abusive marriage because their husbands threaten they may be deported. *See id.* Although these threats may be empty and without a legal or factual basis, a woman may still believe her husband if she has no other way to obtain information. *See id.*

221. *See* Anderson, *supra* note 3, at 1416 (citing that the provisions of the Immigration and Marriage Fraud Act of 1986 allows husbands to dominate the petitioning process for wives who have not attained conditional status); Lubetkin, *supra* note 217, at 621 (reiterating that the petitioning process has become a weapon used by husbands to control their immigrant wives). *See generally*, Melissa Hooper, *When Domestic Violence Diversion Is No Longer an Option: What to Do with the Female Offender*, 11 BERKELEY WOMEN'S L.J. 168, 179 (1996) (echoing that battered immigrant wives may have no other choice but to live with the violence because they depend on their husbands to petition for their legal status).

advocacy.²²² Both groups of women also care about how their families, religions, and respective societies will react to the exposure of their abuse.²²³

Despite these similarities, domestic violence is especially destructive for immigrants.²²⁴ Immigrant women need help obtaining legal residency or citizenship, finding programs that will serve immigrants, and especially need interpreting and translating aid in order to fully understand what they are facing.²²⁵ Also, the constant and paralyzing fear of removal distinctly belongs to the immigrant and her children.

VI. VAWA

A. *The Need for Protection*

Legislation exists which may alleviate some fears the battered immigrant has of being removed at the will of her spouse. On September 13, 1994,²²⁶ President Clinton signed a crime bill that included the Violence Against Women Act (VAWA).²²⁷ VAWA is a congressional bipartisan

222. See *Directory of Immigrant Legal Services Programs*, LEGAL REMEDIES FOR BATTERED IMMIGRANT WOMEN (Criminal Justice Division of the Governor's Office, Austin, Tex.), May 20, 1998, at 409-30 (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (listing organizations aimed at providing help and services for immigrants).

223. See Smith & Coukos, *supra* note 98, at 39 (stating that a victim's family may pressure her to stay in the abusive marriage). The family church may pressure the women to stay in the marriage. See *id.*; Dow, *supra* note 113, at 67 (discussing the view that single-parent families, including those that resulted from divorce, are inherently dysfunctional).

224. See Franco, *supra* note 2, at 99 (asserting that domestic violence can be especially devastating for an immigrant woman because often she has no resources, friends, family, or English language skill).

225. See *Issues Facing Battered Immigrant Women*, REMEDIES AVAILABLE UNDER FAMILY AND IMMIGRATION LAW (Center for Legal and Social Justice, San Antonio, Tex.), Sept. 18, 1998, at 2 (discussing several obstacles immigrant battered women face when leaving an abusive relationship). Domestic violence victim advocates have noted that immigrant women have an especially difficult time leaving their abusers because they distrust the American legal system, they fear deportation, and they are faced with language, cultural, economic barriers. See *id.* Advocates note that an inability to speak English prevents women from obtaining much needed information and hinders their communication with police or service providers. See *id.*

226. See Dannielle M. Houck, Note, *VAWA After Lopez: Reconsidering Congressional Power Under the Fourteenth Amendment in Light of Brzonkala v. Virginia Polytechnic and State University*, 31 U.C. DAVIS L. REV. 625, 627 (1998) (noting the date which VAWA was signed into law by President Clinton).

227. See Jennifer Lynn Crawford, Note, *America's Dark Little Secret: Challenging the Constitutionality of the Civil Rights Provision of the Violence Against Women's Act*, 47 CATH. U. L. REV. 189, 193 (1997) (showing that VAWA was enacted as Title IV of the Violent Crime Control and Law Enforcement Act, part of the Omnibus Crime Package).

effort²²⁸ made in response to the states' lack of effort in punishing gender-related violence²²⁹ and to address a variety of instances of violence against women.²³⁰

Under VAWA, a violent crime is described as a crime in which, among other things, the defendant uses, or threatens to use, physical force against the person or property of another.²³¹ VAWA provides a federal civil rights cause of action for victims of violent crimes motivated by gender²³² and allows anyone, who is a victim of gender-motivated violence, to bring a cause of action for civil relief.²³³

1. The VAWA Process

The civil cause of action available under VAWA allows women to sue their assailants in federal court.²³⁴ In order for the VAWA option to be available, the assailant's action must have been motivated by the victims gender or animus of gender.²³⁵ In addition, VAWA also contains provi-

228. See Goldfarb, *Civil Rights Remedy*, *supra* note 37, at 396; see also Hearn, *supra* note 45, at 1097 (attesting to the bi-partisanship of VAWA).

229. See Winskie, *supra* note 213, at 985 (arguing that state courts and police mistreat battered women and "frequently refuse to enforce the law" on the victims' behalf).

230. See Farrior et al., *First Panel: U.S. Strategies for Eliminating Sexual Violence Against Women*, 6 TEX. J. WOMEN & L. 273, 284 (1997) (acknowledging that the federal government promulgated VAWA to "deal with a variety of types of violence against women"); see also Winskie, *supra* note 213, at 986 (asserting Congress enacted VAWA largely because of the "states' inability to deal with gender based violence").

231. See Violence Against Women Act of 1994, Pub. L. No. 103-322, Title IV, 108 Stat. 1902 (codified as amended in Violent Crime Control and Law Enforcement, Subchapter III, Part C, 42 U.S.C. § 13981 (d)) (defining the terms "gender motivated crime" and "crime of violence"); see also Houck, *supra* note 226, at 630 (explaining that "violent crime" is a crime where an individual "uses, attempts to use, or threatens to use physical force against the person or property of another").

232. See Winskie, *supra* note 213, at 986 (noting VAWA was passed to provide victims of gender-motivated violence "a Federal civil rights cause of action").

233. See Goldfarb, *Civil Rights Remedy*, *supra* note 37, at 391; see also Crawford, *supra* note 227, at 194 (showing VAWA increased funding for rape prevention programs and battered women's shelters).

234. The Violence Against Women Act of 1994, Pub. L. No. 103-322, Title IV, 108 Stat. 1902 (codified as amended in scattered sections of 8, 18, and 42 U.S.C.). The Act's purpose includes the following:

Pursuant to the affirmative power of Congress to enact this part under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution, it is the purpose of this part to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender.

235. See *id.* at § 13981(d) ("the term 'crime of violence motivated by gender' means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender.").

sions especially aimed at helping the battered immigrant escape a violent marriage without risking removal.²³⁶ Three such pertinent provisions of VAWA are: “(1) self-petition process for undocumented women and children; (2) relief from deportation; and, (3) an easing of the evidentiary burden for those lacking corroborating evidence of their battery and abuse.”²³⁷ VAWA attempts to protect immigrant women whose husbands try to use their wives’ lack of citizenship or documentation as a way to physically, mentally, emotionally, and economically abuse both the immigrant and her children.²³⁸ The battered immigrant has an opportunity to self-petition and obtain legal status without the support of the citizen or legal resident batterer.²³⁹ She may initiate VAWA proceedings to gain her residency status, change her status,²⁴⁰ or file for suspension of removal if removal proceedings are underway.²⁴¹

Although these VAWA provisions provide relief to battered immigrants by allowing them to self-petition, one must be a member of a group from which the INS accepts applications.²⁴² In addition, immigrant provisions require a high burden of proof to avoid removal.²⁴³ Relief under VAWA requires, that the immigrant:

is a person of good moral character,

236. See Immigration and Nationality Act § 204 (a)(1)(A)(iii)(I), 8 U.S.C. § 1154 (a)(1)(A)(iii)(I) (1996) (stating that an immigrant may be granted legal status if “the alien is residing in the United States, the marriage the alien and the spouse entered into was in good faith by the alien, and during the marriage, the alien or a child of the alien has been the subject of extreme cruelty perpetrated by the alien’s spouse”).

237. Farrior, *supra* note 230, at 284.

238. See Gail Pendleton, *Immigration Relief for Non-Citizens Suffering Domestic Violence 1998 Update*, LEGAL REMEDIES FOR BATTERED IMMIGRANTS, (Crim. Just. Div. of the Governor’s Office, Austin, Tex.), May 20, 1998, at 2 (on file with *The Scholar: St. Mary’s Law Review on Minority Issues*) (explaining a “battered spouse waiver” exists for a battered immigrant or her child who has been abused by her spouse).

239. See Franco, *supra* note 2, at 116-17 (describing VAWA’s “multi-pronged approach” as including funds to increase public knowledge of domestic violence, the means to train police agencies and the legal communities, gives battered women certain protective outlets and devices, provides victims of gender-motivated felonies a civil cause of action, and gives battered immigrants the ability to petition for residency status on their own).

240. See *id.* at 118 (revealing the requirements a battered immigrant woman must demonstrate to be eligible for the VAWA alternative: (1) the battered immigrant must have entered her marriage in good faith, (2) she must show she was the victim of “battery or extreme cruelty during the marriage,” and (3) the battered immigrant must demonstrate she “would suffer extreme hardship” if removed).

241. See *id.*

242. See Pendleton, *supra* note 238, at 4 (stating that VAWA applications are accepted from “abused spouse and children of legal permanent residents or United States citizens”).

243. See Farrior et al., *supra* note 230, at 284 (noting that the “primary concern” regarding immigrant related aspects of VAWA is the “high burden of proof needed to prevent deportation”).

has resided in the United States with a U.S. citizen, or legal resident spouse or parent,
 is currently residing in the United States,
 is married to a U.S. citizen or lawful permanent resident at the time of filing the self-petition,
 has a spouse or parent who is a U.S. citizen or lawful permanent resident,
 is married in good faith,
 was battered or subjected to extreme cruelty during the marriage,
 and
 [her] deportation (removal), in the opinion of the Attorney General, would result in extreme hardship to her or her child.²⁴⁴

Due to these numerous requirements, immigrants often face difficulty in proving their burden.²⁴⁵ An example of such difficulty is proving the extreme hardship requirement. Extreme hardship may include economic deprivation, unemployment, and readjustment to life in the immigrant's country of origin.²⁴⁶ Additionally, the INS will also consider (1) the physical and emotional harm the immigrant suffered as a result of the abuse, (2) the effect on the immigrant of losing to the U.S. courts and criminal justice systems, (3) the facial, medical, and mental needs of the immigrant's children, and services to treat those needs that may not be avail-

244. See Pendleton, *supra* note 238, at 5-20 (listing the requirements of VAWA).

245. See Loke, *supra* note 11 (reporting that often immigrant women are unable to convince an immigration judge that their removal would cause them extreme hardship). The judge's decision, as to whether the immigrant has proved extreme hardship, is discretionary. See *id.* Lilienthal, *supra* note 12, at 1614-33 (expanding on reasons why immigrants have a difficult time proving their burden). First, if the immigrant begins her self-petition after she divorces her abuser, she may not file. See *id.* at 1614. In light of this, a husband may damage his wife's chances of a VAWA petition if he threatens to divorce her. See *id.* Second, often these women need help from their batterer in documenting a good faith marriage. See *id.* If he is uncooperative, they may not be able to prove they married in good faith. See *id.* Third, a woman's chances of completing a successful VAWA petition may be hindered by concentrating on good moral character and extreme hardship provisions. See *id.* at 1615. One arrest or run-in with authorities may destroy her chances of proving good moral character. See *id.* Alternatively, a woman may not be able to prove that returning to her country would inflict an extreme hardship on her. See *id.*

246. See Pendleton, *supra* note 238, at 22 (citing evidence of extreme hardship). Mental and physical hardship may constitute extreme hardship if there is adverse documented treatment of women in the immigrant's country of origin. See *id.* Also, unique or specialized medical needs and treatment, as well as economic hardship and lack of employment opportunities in the immigrant's country of origin may be considered in determining whether the immigrant has proven extreme hardship. See *id.* The age of the applicant, the amount of time spent in the United States, ties to her family, and trauma to the immigrant's children (if they must be removed with her) may also factor in a determination of extreme hardship. See *id.*

able in the another country, (4) the laws and customs of the immigrant's own country, especially those that would punish or shun the petitioner or her child, (5) the abuser's ability to travel to the immigrant's country of origin, (6) the willingness of the other country's authorities to protect the spouse, (7) and the probability that the abuser's friends or family would harm the petitioner or her child.²⁴⁷

2. Extreme Hardship Standard—There is Still Hope for Relief

There has been a move to expand the breadth of the extreme hardship standard that may provide some relief.²⁴⁸ The Department of Justice has said, in interim rules, that there should be a strong connection between the extreme hardship standard and the existing conditions in the immigrant's country of origin.²⁴⁹ These interim rules may provide leeway for helping immigrant victims of domestic violence stay in this country if a return to their country of origin "would subject them to grave danger."²⁵⁰ Through these interim rules, women can claim conditions in their home country are relevant in resolving extreme hardship. For example, they may assert that minimum standards for protection against domestic violence are unmet in their country.²⁵¹ The ability of women to claim that certain conditions exist in their countries demonstrates that some of the extreme hardship considerations are protective in nature.²⁵²

Finally, judges may deliberate over the impact separation may have on both mother and children should the mother be removed, as well as the feasibility of visitation and child support. The court has the discretion to decide to what extent the woman is an asset to the United States.²⁵³

247. See Pendleton, *supra* note 238, at 53.

248. See Farrior et al., *supra* note 230, at 284-85 (discussing the move towards a broader reading of the extreme hardship standard).

249. See Pendleton, *supra* note 238, at 3, 15-16 (citing the interim rules and calling the extreme hardship provision a "primary barrier"). The immigrant is required to explain in an affidavit why she and her children would suffer if subject to deportation. See *id.* at 16.

250. See Farrior et al., *supra* note 230, at 285 (arguing the interim rules may help battered immigrants stay in the United States).

251. See *id.* at 281 (arguing Mexican women may try to argue the conditions in their home country should be considered when determining 'extreme hardship').

252. See *id.* (showing that four minimal protections include: (1) consideration of laws providing protective orders that will punish an assailant criminally and civilly, (2) criminal sanctions regarding domestic violence, (3) knowledgeable law enforcement officers and judges trained in domestic violence; and (4) adequacy of financial backing for domestic violence advocacy and women's shelters).

253. See FAMILY VIOLENCE PREVENTION FUND, DOMESTIC VIOLENCE IN IMMIGRANT AND REFUGEE COMMUNITIES 54 (Deeana L. Jang et al. eds., 2d ed. 1997) (explaining that "immigration offices often have a great deal of discretion in making their decision").

3. VAWA Options: Self-Petition

Through the approval of a self-petition, a battered immigrant will become immediately eligible for an immigrant visa if she is married to a U.S. citizen.²⁵⁴ Those married to legal residents will not be immediately eligible, but must wait for a visa to become available.²⁵⁵ Visa availability, is determined by the file number assigned to their petition.²⁵⁶ The sooner an immigrant files in these cases, the sooner she will be considered for an available visa.²⁵⁷ Self-petitioners who are spouses of legal residents must wait two to ten years before they may obtain their "green card."²⁵⁸ In the meantime, these immigrants become conditional residents.²⁵⁹ If removal proceedings are already taking place, the immigrant may apply for suspension of those proceedings before she can begin a petition. In this instance, immigration courts have the power and discretion to waive grounds for deportation.²⁶⁰ If suspension is granted to the immigrant, she will gain permanent residency. In order to obtain a petition, the immigrant must show she is eligible for suspension.²⁶¹ Whether to grant a suspension is left to the judge's discretion.²⁶²

254. See Lilienthal, *supra* note 12, at 1612 (asserting that immigrants married to U.S. citizens do not have to wait for the next available visa because of their classification as an immediate relative). Immigrant wives of U.S. citizens are able to adjust their immigrant status after their VAWA petition is approved. See *id.*

255. See Loke, *supra* note 11, at 618 (stating that "spouses of LRPs [Legal Permanent Residents] must wait for a visa before they can request an adjustment of status").

256. See Lilienthal, *supra* note 12, at 1612 (showing that the availability of visas determines when an immigrant's status is adjusted).

257. See *id.* (describing a "priority date" system in which an immigrant is placed on a waiting list containing names of those seeking visas).

258. See Joe A. Tucker, *Assimilation to the United States: A Study of the Adjustment Statutes and the Immigration Marriage Fraud Act*, 7 YALE L. & POL'Y REV. 20, 24 (1989) (claiming wives of legal permanent residents have to wait two-ten years for a visa because the "quota system" for 'second preference immigrants' is "severely backlogged").

259. See Mason, *supra* note 10, at 658 (explaining that VAWA allows battered immigrants to obtain their "unconditional permanent resident status").

260. See Loke, *supra* note 11, at 615 (describing the Immigration Reform Act which allows for cancellation of removal proceedings for "undocumented immigrant women who meet essentially the same requirements as those under VAWA's suspension of deportation"). Although a battered woman may meet all the necessary requirements, the judge has the discretion to deny the request. See *id.* The Attorney General is only allowed to cancel removal for 4,000 immigrants per fiscal year. See *id.* at 615.

261. See Lilienthal, *supra* note 11, at 1612 (explaining that the availability of visas determines when an immigrant's status is adjusted).

262. See Kelly, *Surviving the Beatings*, *supra* note 217, at 325-26 (outlining the discretion of immigration judges). Immigration judges have the discretion to grant an immigrant 'cancellation of removal request. See *id.* The judge must balance "the right and needs of the victim against the interest of the federal government and American public." See *id.*

4. The Importance of VAWA

Notwithstanding the barrage of requirements a battered immigrant must meet in order to have relief under VAWA, VAWA does work. One example of relief VAWA provided for an immigrant woman is discussed in *Vega-Zazueta v. Immigration and Naturalization Service*.²⁶³ In *Vega-Zazueta*, an immigrant woman (Vega) came to the United States at age sixteen.²⁶⁴ She met and married a man at age eighteen.²⁶⁵ Shortly after her marriage, Vega's husband was unfaithful, abusive, and did not financially provide for Vega or their children.²⁶⁶ He never filed a petition for his wife and threatened to take her children away and report her to the INS.²⁶⁷ Vega left her husband and supported herself and her children for several years.²⁶⁸ However, Vega was later found deportable by the INS.²⁶⁹ She claimed she could not file a timely suspension for deportation petition because of the mental injury caused by abuse, the lack of financial support, and her need to care for a sick child who needed medical attention.²⁷⁰ As a result, Vega missed the deadline imposed by INS.²⁷¹ She later learned, by mail, that an immigration judge had ordered her deportation.²⁷² The Board of Immigration Appeals (BIA)²⁷³ later declined to reopen her suspension of deportation proceeding.²⁷⁴ Meanwhile Vega had filed a VAWA petition.²⁷⁵ The court discovered Vega had a VAWA petition currently before the BIA and decided that, due to the likely success of Vega's VAWA petition, it would postpone a decision on the BIA's refusal to grant her suspension of deportation until the VAWA application was resolved.²⁷⁶ Vega's story is one example of how a VAWA petition, as a simple consideration in deportation proceed-

263. No. 95-70856, 1997 WL 413599 (9th Cir. July 10, 1997).

264. *See id.* at *1.

265. *See id.* at *1.

266. *See id.* at *1.

267. *See id.* at *1.

268. *See id.* at *1.

269. *See Vega-Zazueta*, 1997 WL 413599, at *1.

270. *See id.* at *1.

271. *See id.* at *1.

272. *See id.* at *1.

273. *See* Marvin H. Morse & Judith O'Sullivan, *An Expanding Planet in a Shrinking Galaxy*, FED. LAW., Oct. 1998, at 22, 24 (describing the Board of Immigration Appeals as an adjudicatory board which "hear appeals in cases of 'removal,' exclusion, or deportation, and asylum).

274. *See Vega-Zazueta*, 1997 WL 413599, at *1.

275. *See id.* at *2.

276. *See id.* at *2.

ings, postponed deportation until the petition could be heard.²⁷⁷ Nevertheless, recent attacks have questioned VAWA's validity and existence.

B. Current Status of VAWA

1. VAWA's Source of Power — The Commerce Clause

Historically, the Commerce Clause has allowed Congress to pass legislation which prohibits activities which interfere with interstate business or travel.²⁷⁸ Congress' use of the Commerce Clause was once considered a plenary power.²⁷⁹ However, with the *Lopez*²⁸⁰ decision, the Supreme Court reminded Congress that the Commerce Clause, though an exclusive power of Congress, is not a plenary power.²⁸¹ According to *Lopez*, Congress may not regulate activities under the rubric of the Commerce Clause which do not have a "substantial effect" on interstate commerce.²⁸² Furthermore, Congress may not create laws addressing matters

277. See Clemencia Prieto & Patricia Castillo, Address at St. Mary's Center for Legal and Social Justice (Sept. 18, 1998) (demonstrating successful use of VAWA petitions). There are other examples of VAWA's success on the merits of the VAWA petition itself. For instance, at a Seminar given at St. Mary's Center for Legal and Social Justice in September of 1998, the Center invited a young immigrant to share her VAWA experience. Like other immigrant women, she had come to the United States at an early age and, subsequently, married a citizen. The marriage produced children. The immigrants husband was also very abusive. When the citizen husband decided to end the marriage, he "tried everything he could" to get the immigrant woman deported. Fortunately, the immigrant was able to prove the abuse she suffered and eventually was granted a green card. Her VAWA petition succeeded. See *id.*

278. See generally *Heart of Atlanta v. United States*, 379 U.S. 241, 261 (1964) (adopting Title II of the Civil Rights Act via the Commerce Clause as constitutional because the Act sought to protect interstate travelers); *Wickard v. Filburn*, 317 U.S. 111, 124-25 (1942) (establishing that a state or local business may be regulated by Congress' Commerce Clause if the business has a "substantial economic effect" on interstate commerce). Congress may use the Commerce Clause power to regulate a local or state business as per *United States v. Darby*, 312 U.S. 100, 119-20 (1941). *Darby* states "the power of Congress to regulate interstate commerce extends to the regulation through legislative action of activities intrastate which have a substantial effect on the commerce or the exercise of congressional power over it. *Id.* at 133.

279. See *Gibbons v. Ogden*, 22 U.S. 1, 197 (9 WHEAT. 1824) (explaining that the Supreme Court acknowledged there has always been an understanding that the will of Congress is plenary and absolute when it comes to the Commerce Clause power).

280. See *Lopez*, 514 U.S. 549 (1995).

281. See *id.* at 549 (establishing that the Constitution withholds a plenary commerce clause from Congress); see also Hasday, *supra* note 149, at 1298 (pointing out that the *Lopez* decision asserted that the commerce clause power does not extend to family law and that regulation of family law has been exclusively local throughout U.S. history).

282. See *Wickard*, 317 U.S. at 129 (explaining that Congress does not exceed its Commerce Clause power if it regulates an activity that has a "substantial affect" on interstate commerce).

which the Supreme Court deems are more properly left to the states.²⁸³ VAWA was passed pursuant to Congress' Commerce Clause and Fourteenth Amendment powers.²⁸⁴ The Commerce Clause allows Congress to regulate economic aspects of American society, namely those things that travel in interstate or have a substantial effect on interstate commerce.²⁸⁵ In addition to responding to the lack of attention given to violence against women in the states, Congress enacted VAWA because such violence may discourage women from traveling interstate, from becoming part of the workforce, and because such violence adds a burden to the health care system.²⁸⁶

2. The Federalism Limitation

Because the United States' basis of government is built on the federalist notion of separation of powers between the federal and state governments, definition of those powers is extremely important. Therefore, if Congress legislates in an area traditionally left to the states, such as crime, Congress must give a valid reason for the legislation.²⁸⁷ In *Lopez*, the Supreme Court held that Congress overstepped its boundaries. This decision has caused concern for proponents of VAWA because the Act, like the act involved in *Lopez*, deals with crime.²⁸⁸ Therefore, anyone who attempts to bring a civil cause of action under VAWA against their

283. See Hasday, *supra* note 149, at 1298 (stating that family law belongs in the states' purview). See, e.g., *Brecht v. Abrahamson*, 507 U.S. 619 (1993) (stating that the United States system of federalism gives states the primary authority to define and enforce criminal law).

284. See Houck, *supra* note 226, at 625-31 (asserting that the legislative history of the Act reveals that Congress mainly focused on its Commerce Clause power).

285. See U.S. CONST. art. I, § 3, cl. 3. Congress may "regulate commerce with foreign nations, and among the several states, and with indian tribes." *Id.*

286. See Winskie, *supra* note 213, at 988 (describing the "serious national consequences" of violence motivated by gender).

287. See GERALD GUNTHER, CONSTITUTIONAL LAW (12th ed. 1991) (citing *United States v. California*, 297 U.S. 175 (1936), which found the federal government may only act to the extent of its powers).

288. See Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 580 (1998) (showing that VAWA proponents devised an argument which claimed the Act created by the federal government was not an unconstitutional criminal statute because state law enforcement historically did not protect battered women); Charis Mincavage, *Title III of the Violence Against Women Act: Can It Survive a Commerce Clause Challenge in the Wake of United States v. Lopez?*, 102 DICK. L. REV. 441, 446 (1998) (acknowledging that VAWA opponents believe VAWA to be an unconstitutional abuse of federal power when the federal government involves itself in criminal cases).

attackers may face a federalism challenge.²⁸⁹ Is VAWA intruding on the states' police powers? Is the federal government usurping state powers?

While laws, such as VAWA, must be created and implemented, legislators must draft these laws in accordance with the division of power in this country. Since the United States adheres to a federalist system²⁹⁰ created by the Framers of the Constitution to ensure that each state's sovereignty is protected, it must approach certain issues carefully.²⁹¹ At times, states are subject to federal laws,²⁹² but the political process and reserved powers overall enable states to operate their governments with limited national control.²⁹³

States are delegated powers not explicitly or implicitly reserved by the federal government,²⁹⁴ including the authority to decide and legislate

289. See Michael J. Kelly, *Political Downsizing: The Re-Emergence of Self-Determination, and the Movement Toward Smaller, Ethnically Homogenous States*, 47 *DRAKE L. REV.* 209, 278 n.177 (1999) (giving a definition of "federalism" as "a form of territorial political organization in which unity and regional diversity are accommodated within a single political system by distributing power among general and regional governments in a manner constitutionally safeguarding the existence and authority of each."). Two distinctive aspects of federalism are: (1) "the distribution of authority between at least two levels of government" and (2) "the coexistence of unity and regional diversity." *Id.* See also Daniel S. Herzfeld, *Accountability and the Nondelegation of Unfounded Mandates: A Public Choice Analysis of the Supreme Court's Tenth Amendment Federalism Jurisprudence*, 7 *GEO. MASON L. REV.* 419 (1999) (examining the design of the Constitution). The Constitution calls for the separation of powers between the executive, legislative, and judicial branches, while also dividing powers among the State governments and the federal government. See *id.*; Steven I. Friedland, *On Treatment, Punishment, and the Civil Commitment of Sex Offenders*, 70 *U. COLO. L. REV.* 73, 85 (1999) (instructing that states traditionally have held "police powers" allowing them to pass laws regarding the health, safety, and morals of their citizens without federal intrusion).

290. See GUNTHER, *supra* note 287, at 65 (explaining that the framers executed a federal division of power in the Constitution by allocating power between a national government and state governments); see also Jonathan Baert Wiener, *Global Environmental Regulation: Instrument Choice in Legal Context*, 108 *YALE L.J.* 677, 800 n.389 (1999) (stating that "the United States is a federalist system in which the states possess much authority"); Thomas Healy, *Is Missouri v. Holland Still Good Law? Federalism and the Treaty Power*, 98 *COLUM. L. REV.* 1726, 1747 (1998) (contending that the federalist system in the United States was the "primary innovation" of our Constitution).

291. See Calvin R. Massey, *The Tao of Federalism*, 20 *HARV. J.L. & PUB. POL'Y* 887, 890 (1997) (saying that the federal system provides for unique restraints on federal control over the states).

292. See U.S. CONST. amend. X (holding that "the powers not delegated the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

293. See Massey, *supra* note 291, at 890-91 (asserting that the political process in the United States curtails the probability that states will be overly burdened by the federal government).

294. See U.S. CONST., amend. X (declaring that the States are granted all powers which the U.S. Constitution does not reserve for the federal government).

over issues concerning the health, safety, welfare, and morals of their citizens.²⁹⁵ Both criminal and family law are usually included in the state powers.²⁹⁶ Historically, Congress has regulated matters economically affecting the country as a whole, and interstate travel, through the use of the Commerce Clause.²⁹⁷

VAWA is a federal act designed, via section five of the Fourteenth Amendment²⁹⁸ and the Commerce Clause, to combat gender-based violence which discourages women from taking jobs, traveling interstate, and burdens the country's health care system.²⁹⁹ Congress claims these factors have a substantial effect on interstate commerce.³⁰⁰ Congress also used VAWA as a vehicle to address the apparent inability or unwillingness of the states to protect victims of gender-motivated violence through state laws.³⁰¹

295. See Friedland, *supra* note 289, at 85 (denoting that "states have broad police powers to protect their citizens' health, safety, welfare, and morals"); Theodore C. Taub, *State Efforts at Regulatory Reform*, 14 A.L.I.-PROP. 645, 687 (1998) (emphasizing that state governments are responsible for protecting their citizens' health, safety, and welfare).

296. See Ann Laquer Estin, *Federalism and Child Support*, 5 VA. J. SOC. POL'Y & L. 541, 574-75 (1998) (pointing to Chief Justice Rehnquist's opinions that "equated family law to criminal law enforcement and education as areas 'where States historically have been sovereign'"); Lisanne Newell Leasure, *Commerce Clause Challenges Spawned by United States v. Lopez Are Doing Violence to the Violence Against Women Act (VAWA): A Survey of Cases and the Ongoing Debate Over How the VAWA Will Fare in the Wake of Lopez*, 50 ME. L. REV. 410, 422 (1998) (asserting that criminal law and family law are traditional areas of state authority by claiming that VAWA federalizes them).

297. See U.S. CONST., art. I, § 8; see also Fee, *supra* note 196, at 95 (providing that the Tenth Amendment gives states the authority to "legislate and to protect the health, safety, and welfare of its citizens"); A. Marice Ashe, *The Low-Level Radioactive Waste Policy Act and the Tenth Amendment: A "Paragon of Legislative Success" or a Failure of Accountability?*, 20 ECOLOGY L.Q. 267, 293 (1993) (showing the Tenth Amendment focuses on state powers to protect state interests).

298. U.S. CONST. amend. XIV, § 5. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *Id.*

299. See Houck, *supra* note 226, at 645-46 (reporting that Congress found gender-based violence to impact commerce).

300. See David M. Fine, *The Violence Against Women Act of 1994: The Proper Federal Role in Policing Domestic Violence*, 84 CORNELL L. REV. 252, 283 (1998) (stating that part of VAWA containing criminal provisions are valid because they include "jurisdictional nexus" and Congress made a finding correlating interstate commerce and domestic violence such as abduction across state lines); Lupu, *supra* note 288, at 579 (noting a provision in VAWA makes it illegal to "travel across a state line with the intent to injure"). VAWA also makes it illegal to commit a crime of violence against a spouse while in the course of travel or as a result of travel. See *id.* Congress made sure the jurisdiction element required for the use of the Commerce Clause was present in VAWA legislation. See *id.*

301. See Winskie, *supra* note 213, at 986 (calling the states impotent in "dealing with gender-based violence").

3. Current Attacks

VAWA has caused controversy.³⁰² The most problematic aspect of VAWA is the availability of a civil cause of action to victims of crimes motivated by gender.³⁰³ Some would argue that the civil causes of action intrude on the states' rights to regulate health, safety, welfare, family law, and criminal activity within state borders.³⁰⁴ In response, VAWA's proponents argue the legislation is a proper exercise of Congress' Commerce Clause power because domestic violence affects interstate activity.³⁰⁵ Did Congress impinge on state powers in enacting VAWA? Although most circuit courts have answered 'no,' the Fourth Circuit answered 'yes' in *Brzonkala v. Virginia Polytechnic Institute and State University*.³⁰⁶

a. 4th Circuit Court's Decision Leaves No Relief for Immigrant Women

In *Brzonkala*, the Fourth Circuit ruled VAWA is not sufficiently related to interstate commercial activity to constitute a valid exercise of Congress' broad Commerce Clause power.³⁰⁷ The court utilized the "substantial effects" test articulated in *Lopez* and recognized the phrase

302. See Hanna, *supra* note 74, at 1511 n.16 (contending VAWA is controversial due to its "feminist origins"); see also Barre-Quick & Kasley, *supra* note 40, at 442-43 (citing the district court decision on *Brzonkala v. Virginia Polytechnic & State Univ.* as fueling the controversy as to whether or not VAWA was a legitimate exercise of Congress' Commerce Clause power).

303. See Hearn, *supra* note 45, at 1312 (calling the availability of a civil cause of action "controversial"). Commentators argue that the fact that VAWA implicates "family law more than equal protection" is "problematic," and assert that "the federalist critique of VAWA" garnered the support of state and federal judges. See *id.* at 1112.

304. See Hasday, *supra* note 149, at 1310 (calling family law the "quintessential symbol of federal noninvolvement"); see also Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073, 1073 (1994) (calling family law a "traditional area of state regulation" and claiming "it should be kept separate from the national business of the federal courts"). But see *Ankenbrandt v. Richard*, 504 U.S. 689, 689 (1992) (citing the majority opinion, joined by Chief Justice Rehnquist along with Justices Scalia, O'Connor, Kennedy, and Souter, claiming federal courts are not constitutionally prevented from hearing acts pertaining to domestic relations).

305. See *United States v. Wright*, 128 F.3d 1274, 1275 (8th Cir. 1997) (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 255-56 (1964) and *Edwards v. California*, 314 U.S. 160, 172 n.1 (1941) which asserts that the "Supreme Court has repeatedly said crossing state lines is interstate commerce regardless of whether commercial activity is involved").

306. *Brzonkala v. Virginia Polytechnic Inst. and State Univ.*, Nos. 96-2316, 96-1814 1999 WL 111891 (4th Cir. Va. Mar. 5, 1999).

307. See *id.* at *6. "Under the Principle articulated by the Court in *Lopez*, it is evident that 42 U.S.C. sec. 13981, like the Gun Free School Zones Act, does not regulate an activity sufficiently related to interstate commerce to fall even within the broad power of Congress under the Commerce Clause." *Id.*

“substantially affects interstate commerce” is a term of art that transcends “mere factual or empirical inquiry.”³⁰⁸ The court also claimed gender motivated crime is not “even arguably commercial or economic.”³⁰⁹ In *Brzonkala*, the government argued that violence motivated by gender does affect interstate commerce in terms of lost productivity and bearing the financial burden of costly violent crimes.³¹⁰ The Fourth Circuit, however, disregarded these arguments stating “it is . . . impossible to link violence motivated by gender animus with any . . . economic transaction/with any specific obstruction of interstate commerce.”³¹¹

b. The Intersection Between *Lopez* and VAWA

Since the *Lopez* decision, attacks have arisen regarding VAWA on the basis that it is an act outside the scope of Congress’ powers.³¹² However, in context, *Lopez* should not have affected VAWA’s validity in *Brzonkala*. In *Lopez*, opponents of gun legislation argued the eventual effect of guns in school zones was too tenuous and did not substantially affect interstate commerce. However, VAWA should not be as vulnerable to these attacks. The effect of violence against women is easily tied to our national economy. For instance, victims of violence must often seek medical attention.³¹³ The increase of activity in hospital emergency

308. See *id.* at *7 (stating “[the Supreme Court in *Lopez*] also made clear, . . . that the ‘substantially affects’ test does not contemplate mere factual or empirical inquiry, but must be understood, in the final analysis, as a legal test, and the phrase ‘substantially affects interstate commerce’ as one of legal art”).

309. See *id.* at *10 (alleging crime induced by gender has no ‘meaningful connection’ to commercial or economic interests then asserting “violence arising from gender animus lacks even a meaningful connection with any specific activity that might arguably be considered economic or commercial in the loosest sense”).

310. See *id.* at *15 (enumerating the arguments the government made linking violent crime to interstate commerce).

311. *Id.* at *16.

312. See Fine, *supra* note 300, at 269-70 (noting that after the *Lopez* decision, many defense attorneys began making numerous arguments challenging federal statutes under the claim that Congress had exceeded its authority including claims from those who were charged with criminal offenses under VAWA); Hasday, *supra* note 149, at 1316 (indicating that the *Lopez* decision explicitly clarified that family law is a state issue and beyond the legislative powers of Congress). VAWA has been under constant attack since the Supreme Court’s decision in *Lopez*. See *id.*

313. See Derek A. Kurtz, *Does the Violence Against Women Act Do Violence to the Limits of Congressional Power*, 34 SAN DIEGO L. REV. 1047, 1052 (1997) (expressing that the nation incurs great costs as a result of violence). It is estimated that five to ten billion dollars per year is spent on “health care, criminal justice, and other social costs of domestic violence.” Since women are fifty percent of the national labor force, in the aggregate, domestic violence affects interstate commerce. *Id.*; Winskie, *supra* note 229, at 987-88 (concluding that the commission of violence on the basis of gender discourages women from traveling interstate, entering the workforce, and puts national burden on health care).

rooms, as well as the strain on medical resources and workers used to treat patients who are intentionally harmed, has a great effect on the national economy and interstate commerce.³¹⁴ Furthermore, investigating these crimes absorbs time and money from police and law enforcement agencies, and prosecuting these crimes undoubtedly puts a stress on judicial resources and the economy. In addition, domestic violence affects commerce since women must miss work and spend time recovering from their injuries.³¹⁵ Aggregately, these missed days result in overall lower productivity.³¹⁶ Furthermore, women who cannot travel due to injury, or because of restrictions imposed by their batterers, are not only restricted from interstate travel, but are also not able to become patrons of many businesses depending on travelers.³¹⁷

If not for *Lopez*, the question of VAWA's constitutionality would likely not be an issue.³¹⁸ *Lopez* does not concern a VAWA dispute, but another

314. See Crawford, *supra* note 227, at 229 n.253 (claiming there is an correlation between emergency medical care and domestic violence); Kurtz, *supra* note 313, at 1052 (expressing the fact that since women are 50% of the national labor force, in the aggregate, domestic violence affects interstate commerce); Lyon, *supra* note 10, at 298 (estimating that between twenty-two and thirty-five percent of women seeking treatment in emergency rooms have been abused by a man they currently are or have been intimately involved); Mandel, *supra* note 200, at 678, n.6 (stating that \$6.5 billion is spent in treating domestic violence victims).

315. See Robertson, *supra* note 10, at 638 (contending that 170,000 days are missed from work each year due to domestic violence and that sizeable number of these women are severely reprimanded or fired); see also Murray, *supra* note 10, at 434 (estimating that \$4 billion is lost per year in U.S. businesses due to "lower productivity, staff turnover, and excessive use of medical benefits").

316. See A. Renee Callahan, *Will the "Real" Battered Women Please Stand Up? In Search of a Realistic Legal Definition of Battered Woman Syndrome*, 3 AM. U. J. GENDER & L. 117, 119 n.7 (1994) (estimating the costs of domestic violence at \$45 billion per year); Murray, *supra* note 10, at 434 (estimating that \$4 billion is lost per year in U.S. businesses due to "lower productivity, staff turnover, and excessive use of medical benefits"); Malinda L. Seymour, *Isn't It a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence*, 90 NW. U. L. REV. 1032, 1037 (1996) (echoing the statistic that businesses annually lose \$4 billion per year due to domestic violence). A study conducted in New York City reported that of 50 battered women surveyed, half missed three days of work, or more, per week. See *id.*

317. See Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After Lopez*, 46 CASE W. RES. L. REV. 801, 813, n.75 (1996) (relaying that the national government can exert national control over issues that have traditionally belonged to state if interstate travel occurs); Winskie, *supra* note 213, at 988 (stating that women are discouraged from traveling interstate due to domestic violence).

318. See Winskie, *supra* note 213, at 988 (demonstrating that a VAWA challenge may not have previously been difficult to defeat because of the assertion that "gender-based violence has serious national consequences: it discourages women from interstate travel, prevents them from entering the workplace, and burdens the national healthcare system"). Even supporters of VAWA concede that "VAWA neither regulates economic activity nor

federal act: The Gun-Free School Zone Act, which made the carrying of a gun into a school zone a federal offense.³¹⁹ As a result of the Gun Free School Zone Act, a student was convicted under federal law and argued that the Act was unconstitutional because Congress had exceeded their authority.³²⁰ The Court, in a 5-4 landmark decision,³²¹ agreed.³²²

contains a qualifying jurisdictional limitation" and that "in no sense of the word is violence economic." *Id.* See also Harry Litman & Mark D. Greenberg, *Federal Power and Federalism: A Theory of Commerce-Clause Based Regulation of Traditionally State Crimes*, 47 CASE W. RES. L. REV. 921, 921 (1997) (claiming no other "legal topic" has generated as much discussion as the *Lopez* decision, in two years of Supreme Court decisions).

319. See The Gun Free School Zones Act of 1990, 18 U.S.C. § 922 (1994 & Supp. 1996); *Lopez*, 514 U.S. at 551; see also Paul E. McGreal, *Alaska Equal Protection: Constitutional Law or Common Law?*, 15 ALASKA L. REV. 209, 210 n.2 (1998) (stating that the 1990 Gun Free School Zone Act made possession of a firearm illegal if within one thousand feet of a school zone); Kristian D. Whitten, *Conditional Federal Spending and the States "Free Exercise" of the Tenth Amendment*, 21 CAMPBELL L. REV. 5, 22-23 (1998) (echoing that the Gun Free School Zone Act federally criminalized possession of a gun in or near a school zone).

320. See 18 U.S.C. § 922 (1994); Litman & Greenberg, *supra* note 318, at 924 (citing the revised version of the Gun Free School Zone Act which was eventually signed into law on September 30, 1996). The Gun Free School Zone Act has considerably the same effect as the one the *Lopez* court found to be unconstitutional. See *id.* The new act reaches the goal of the original Act through statutes found to be similar to those found unconstitutional in *Lopez*. See *id.* Some feel if the Court were really revising the Commerce Clause power, then the newly tailored Gun free School Zone Act would be meaningless and a waste of Congress' time. See *id.* However, this new act has passed without almost any notice. See *id.* The new act simply adds twelve words to the old Act. See *id.* at 928. The first act read: "It shall be unlawful for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." The new act adds the following language to the existing Act: "that has moved in or that otherwise affects interstate is foreign commerce." 18 U.S.C.A. § 922(q) (1998). This is a modest change. It may appear that crafty or smart drafting may numb the effect of the new commerce clause standards set forth in *Lopez*. Therefore, if VAWA faces, and loses, a constitutional challenge in the Supreme Court, the law may be redrafted to pass constitutional muster.

321. See William Funk, *The Lopez Report*, ADMIN. & REG. L. NEWS, Summer 1998, at 1 (asserting that although "the Supreme Court did not purport to modify the black-letter law of the Commerce Clause, *Lopez* failed to meet the traditional tests invoked by the court); Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL'Y 247, 265-66 (1997) (asserting that, in *Lopez*, the Supreme Court "relied upon the principle of limited national power, which is evident in the text and structure of Article I and is even more explicit in the tenth Amendment").

322. See *Lopez*, 514 U.S. at 567 (holding that the possession of a gun in "a school zone is in no sense an economic activity"); Litman & Greenberg, *supra* note 318, at 924 (demonstrating that the Senate introduced another version of the Gun Free School Zone Act which was slightly modified from the original on June 7, 1995). The new Gun Free School Zone Act eventually passed on September 30, 1996 as part of an omnibus bill. See *id.* The new Gun Free School Zone Act merely added 12 words to the old act. See *id.* at 928. The original act stated "It shall be unlawful for any individual to knowingly possess a

In its decision, the Supreme Court created a new “substantial effects” test,³²³ which was used in *Brzonkala*, to examine legislation regulating interstate activities. The Court declared that Congress may regulate only those interstate activities which are commercial or economic in nature, or that substantially affect commerce.³²⁴ The economic aspect is key under the new test a statute will pass the test if it involves commerce or economics on its face, or is essentially a part of a larger economic regulation.³²⁵

The government claimed *Lopez* met these standards by asserting that violent crime is a national commercial problem which affects interstate

firearm at a place that the individual know, or has reasonable cause to believe, is a school zone.” *Id.* The new act added “that has moved in or that otherwise affects interstate or foreign commerce”. *Id.*

323. In *Lopez*, the Supreme Court enumerated three categories which Congress may regulate using the Commerce Clause Power. *See Lopez*, 514 U.S. at 558-59. It noted that Congress may “regulate the use of the channels of interstate commerce.” *Id.* at 558. This includes keeping channels “free from immoral and injurious uses.” *Id.* The Court also noted that Congress has the power to “regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce.” *See id.* Finally, the court held that Congress’ power included the right “to regulate those activities that substantially affect interstate commerce.” *See id.* As a result, Congress may only regulate activities which “substantially affect” intrastate commerce. *See id.* at 559. In finding the Gun Free School Zone Act neither regulated an “economic enterprise” nor was “an essential part of a larger regulation of economic activity,” the *Lopez* Court did not decide that, in the aggregate, the statute substantially affected interstate commerce. *See id.* at 561. The finding, therefore, meant the Court would now consider a single activity as isolated, rather than in the aggregate, when looking for the affect on intrastate commerce. *See id.* at 557. The Court simply examined how the possession of one gun in one school, rather than many guns in many schools, substantially affected interstate commerce. *See id.*

324. *See Winskie, supra* note 213, at 990-91 (reporting that a new test was created by the court which declared Congress only has authority to regulate in state activities which are “commercial or economic in nature or that substantially affect interstate commerce”). A substantial effect may be demonstrated through a statutory jurisdictional element which ensures that each individual case will affect interstate commerce or by Congress’ findings regarding the activity’s effect on interstate commerce. *See id.* at 991; *see also Fine, supra* note 300, at 265 (describing the types of regulation Congress may pass using the Commerce Clause). Congress may regulate: (1) “channels of interstate commerce,” (2) “instrumentalities of interstate commerce . . . which include persons or things in interstate commerce, even though the threat may come only from intrastate activities,” and (3) “activities that have a substantial relation to interstate commerce.” *Id.*; Gary J. Rucelshaus, Casenote, 9 SETON HALL CONST. L.J. 241, 303 n.24 (1998) (reiterating the three types of activities the *Lopez* Court decided that Congress may regulate under the Commerce Clause).

325. *See Fine, supra* note 300, at 265 (asserting that the Supreme Court, in *Lopez*, explained that a federal act must demonstrate that the regulated activity is part of a “larger framework of economic regulation”). The Court conceded that a federal criminal statute would pass Commerce Clause muster if the statute is an “essential part of a larger regulation of economic activity.” *Id.* at 266; *see also Lopez*, 514 U.S. at 563 (finding Congress may regulate non-economic activities, but that it is subject to closer scrutiny in determining if there is substantial affect on interstate activity).

travel and which causes increases in insurance rates.³²⁶ The government also asserted that violent crime would create a disadvantaged and ill-prepared workforce since guns in school zones are detrimental to education. Nevertheless, the Court stated that Congress does not have the authority to “trample” on state power.³²⁷

4. Possible Ramifications on VAWA

The arguments over the effect of *Lopez* continue.³²⁸ Some believe *Lopez* is just the Supreme Court's way of reminding Congress that the Court is still paying attention.³²⁹ Others assert, however, that this decision marked the beginning of a new era in Commerce Clause jurisprudence.³³⁰ Regardless of the questions relating to the meaning of *Lopez*, the case has caused changes in the way legal thinkers view the Commerce Clause.³³¹

326. See *Lopez*, 514 U.S. at 563 (holding that the United States argued possessing a gun in or near school could result in the commission of a violent crime which would, in turn, eventually affect the economy on a national scale). The United States argued that since violent crimes are very costly, they would drive-up insurance costs, which would, in turn, affect the entire nation. See *id.* The government also argued that if a particular area is violent, travelers will be discouraged from entering those areas thereby impeding travel. See *id.* Furthermore, the government proffered that guns in school threaten the educational process. See *id.* This adverse affect on education institution will decrease the quality of learning in the United States and eventually result in an ill-prepared, less productive workforce. See *id.*

327. See Winskie, *supra* note 213, at 993 (reporting that the Supreme Court in *Lopez* did not want a “general police power” to evolve in Congress through its use of the Commerce Clause). The Court found the Commerce Clause cannot be used to step on state authority. See *id.*

328. See *Lopez*, 514 U.S. at 565 (Breyer, J., dissenting opinion) (contending that the Gun Free School Zone Act falls within the three new criteria the majority set forth for regulating commerce under the Commerce Clause). In his dissent, Justice Breyer explains that Congress does not exceed its powers with a law like the Gun Free School Zone act and *Lopez* is of little effect.

329. See Julian Epstein, *Evolving Spheres of Federalism After U.S. v. Lopez and Other Cases*, 34 HARV. J. ON LEGIS. 525, 526 (1997) (echoing that the *Lopez* court established limits to Congress' Commerce Clause power, predicting “it will make Congress more cautious about its use of the Commerce Clause”); Steven Rosenberg, *Just Another Kid With a Gun?*, 28 GOLDEN GATE U. L. REV. 51 (1998) (articulating the Supreme Court attempt to limit the Commerce Clause power in *Lopez*); Whitten, *supra* note 319, at 24 (stating “With its decision in *Lopez*, the Rehnquist Court made clear that the Commerce Clause does not grant Congress plenary police power.”).

330. See Litman & Greenberg, *supra* note 318 (claiming legal thinkers view *Lopez* as having changed long and deeply held beliefs and inferences regarding Congress' Commerce Clause power).

331. See *id.*

Although the Supreme Court has not reviewed a VAWA case, some believe *Brzonkala* may reach the Court.³³² In light of the Supreme Court's decision in *Lopez*, there may be reason to believe VAWA will face a tough challenge in proving it meets the requirements established in the "substantial effects" test. Surprisingly, Chief Justice Rehnquist has already asserted the Act has nothing to do with commerce, accentuating the point that criminal prosecution is within the province of the states.³³³ Furthermore, in a speech given before federal judges,³³⁴ the Chief Justice has foreshadowed the difficulties possibly awaiting VAWA before the Supreme Court when he commented that VAWA was a waste of "precious judicial resources."³³⁵ Additionally, questions regarding the federal judiciary's workload have been raised.³³⁶ Chief Justice Rehnquist has expressed unhappiness over the increased caseload and the make-up of the cases in federal courts today.³³⁷ However, the question of how to best allocate the federal judiciary's time and resources is a political question that cannot be decided by the judiciary.³³⁸ Although there is an increase in criminal matters facing federal courts, most of these matters actually result from drug cases.³³⁹ Statistical evidence reveals the federal government's role in criminal law enforcement has been selective and has even

332. See Brooke A. Masters, 'Violence Against Women Act' Ruled Unconstitutional by Court, *SAN ANTONIO EXPRESS-NEWS*, Mar. 6, 1999, at 2A (stating "legal analysts said the case is likely to reach the Supreme Court, where it could be a vehicle for putting more limits on Congress' ability to pass legislation in areas where states also have authority").

333. See Litman & Greenberg, *supra* note 318, at 921 (questioning the court's concept of constitutionality and separation of powers, based upon the lack of opposition to federal drug laws).

334. See Hasday, *supra* note 149, at 1313-14 (citing Chief Justice Rehnquist's address the Judicial Conference of the United States).

335. See *id.* at 1314 (noting that Justice Rehnquist personally spoke against VAWA when he said 'precious' resources should . . . be reserved for issues where important national issues predominate," but has never publicly implied that gender-motivated violence is not serious).

336. See Litman & Greenberg, *supra* note 318, at 973 (reporting that the Chief Justice, as well as judges at judicial conferences and committees, have expressed surprise over the material that creates the federal judicial workload).

337. See *id.* (noting that judges, committees, and Justice Rehnquist "have been vocal in expressing their dismay over the increase in size and the change in make-up of the workload of the federal courts"). But see Cahn, *supra* note 304, at 1109 (asserting that the VAWA's civil cause of action will not cause the feared increase of federal docket caseloads as originally expected by federal court judges).

338. See Litman & Greenberg, *supra* note 318, at 974 (calling the allocation of judicial resources "fundamentally a political decision, best suited to the political branches of government").

339. See *id.* at 963 (asserting federal courts decide many federal criminal drug cases). The amount of drug cases dwarfs the amount of federal prosecutions arising under other federal statutes. See *id.*

declined for over half a century.³⁴⁰ Such information directly contradicts claims that federalization of crime has gone too far.

C. VAWA II

Although there are constitutional questions facing VAWA, the House and Senate have discussed new versions of VAWA which have been referred to as the Violence Against Women Act II and the VAWA Restoration Act.³⁴¹ Congress announced that the purpose of the Battered Immigrant Section of the legislation is to retain the goals of the 1994 legislation which was to “remove immigration laws as a barrier that kept battered immigrant women and children locked in abusive relationships.”³⁴² Congress intends to allow battered immigrants to avoid removal and obtain protective orders against their abusers. Also, these women will be able to cooperate with police in the prosecution of their batterer.³⁴³

The new bills include protective measures against additional types of violence against women that involve issues dealing with (1) elder abuse, (2) sexual abuse, (3) the role of the courts, (4) grants to reduce violent crimes against woman on campus, (5) grants to authorize arrest policies, (6) hate crime prevention, (7) strengthening services to victims of violence, (8) needs assessment, (9) battered women employment protection, and (10) insurance for battered women, as well as other proposals.³⁴⁴

Additionally, in a letter to United States Representative Richard Armey, the Human Rights Clinic of the St. Mary's Center for Legal and Social Justice³⁴⁵ described the new VAWA as restoring aid to immigrant

340. See Stacy & Payton, *supra* note 321, at 250 (noting the declining role the federal government plays in law enforcement).

341. See § 2110, 105th Cong. (1998); H.R. 3514, 105th Cong. (1998).

342. See H.R. 3514, 105th Cong. § 622(a)(1) (1998).

343. See *id.* at § 622(c) (explaining that Congress is seeking to allow battered immigrants to seek the aid of law enforcement and the courts without those authorities inquiring into the immigrant's status or reporting that immigrant to the INS).

344. See *Feminist Majority Newsletter, Violence Against Women Act to Be Improved* (visited Mar. 19, 1999) <http://www.feminist.org/Research/report/94_nine.html> (revealing VAWA I will include provisions including “local shelters, campus safety, equal justice in courts, and other programs to protect women”). VAWA II is expected to include provisions regarding student safety, training for medical students so they may better identify victim of violence, hate crimes – including lesbians, gays, and those who are disabled.

345. St. Mary's Center for Legal and Social Justice was founded for the purposes of serving the legal needs of the poor and indigent as well as train student attorneys attending classes at St. Mary's School of Law. The center contains five separate clinics: The Community Development Clinic, the Civil Justice Clinic, the Human Rights Clinic, the Criminal Justice Clinic, and the Immigration Clinic. The Human Rights and Immigration Clinics use VAWA petitions to secure residency status for battered immigrant women.

women and children no longer eligible for such relief due to the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).³⁴⁶ The IIRIRA, in effect, nullified many of the protective devices given to immigrants in the original VAWA.³⁴⁷ The intention of the recently introduced VAWA II is to restore the intended effects of the original VAWA.

The needs of immigrant battered women are unique.³⁴⁸ In VAWA's attempt to meet some of these needs, the Act has still been subject to criticism and scrutiny.³⁴⁹ Even if VAWA does not provide for all the needs of immigrant women, VAWA does provide much needed opportunities for battered immigrant women. Despite the fact that only the civil portion of VAWA is under attack, immigrant women will lose their right to self-petition if VAWA is struck down. Immigrant battered women and children may be forced to stay in abusive relationships, while having their residency status dangled over their heads by an abuser, and may subsequently be subject to deportation.

VII. BEST INTEREST STANDARD

Unfortunately, even with VAWA as an avenue to gain aid, many immigrant women still face another battle: fighting for custody of their children. While trying to secure their own personal safety and stable resident status, many immigrant women must still care and worry for their children. If the immigrant cannot obtain help under VAWA, she may inevitably face removal.³⁵⁰ The mother's removal will assuredly make a custody dispute more difficult. A family court is thus left with the task of deciding

346. See Wolchok, *supra* note 169, at 12 (describing the IIRIRA as "immigration overhaul legislation").

347. See Letter from The Human Rights Clinic, St. Mary's Center for Legal and Social Justice, to Richard Arme, U.S. Congress (Sept. 29, 1998) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (advising Arme that IIRIRA would significantly undermine VAWA's relief). Advocates argued that by limiting the number of allowable removal cancellations, IIRIRA would hurt immigrant battered women. See *id.* Advocates also argued that by imposing a ten year exile for those immigrants residing illegally in the United States IIRIRA had an adverse impact on VAWA. See *id.*

348. See Franco, *supra* note 2, at 134 (commenting that immigrant women are in a unique situation which requires both long-range and short-term aid).

349. See *id.* at 106 (bemoaning IMFA's effect on immigrant battered women); Rivera, *supra* note 193, at 121 (claiming that the legislature's responses to domestic abuse does not remedy the underlying problem which is the "oppression of women as a group within society and the powerless position of individual women in male/female relationships").

350. See *Potential Problem Areas for VAWA Self Petitioners*, LEGAL REMEDIES FOR BATTERED IMMIGRANTS, (Crim. Just. Div. of the Governor's Office, Austin, Tex.) May 20, 1998, at 165 (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (asserting it is up to the immigration judge's discretion as to whether the immigrant has met her burden).

with whom the child should reside.³⁵¹ In custody cases, judges usually use the “best interest” standard to determine the issue.³⁵² The best interest standard is a crucial aspect of family law.³⁵³ The Uniform Marriage Divorce Act³⁵⁴ defines a child’s best interest as encompassing the following factors:

- (1) the wishes of the child’s parent or parents as to his custody,
- (2) the wishes of the child as to his custodian,
- (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child’s best interest;
- (4) the child’s adjustment to his home, school and community;
- (5) the mental and physical health of all individuals involved.³⁵⁵

However, how effectively do family court judges evaluate these elements when one parent is an U.S. citizen and the other is facing deportation, yet the children are also U.S. citizens? Do judges consider and weigh these factors fully in these special cases as opposed to typical child custody disputes? Questions may arise as to whether judges are fully

351. See Interview with Monica Schurtman, Director, Human Rights Clinic, St. Mary’s Center for Legal and Social Justice, San Antonio, Tex. (Sep. 1998) (explaining that St. Mary’s Human Rights Clinic had a client who concurrently fought her residency status and for custody of her child).

352. See Linda S. Eckols, *The Marriage Mirage: The Personal and Social Identity Implications of Same-Gender Matrimony*, 5 MICH. J. GENDER & L. 353, 396 (1999) (presenting the fact that custody cases require that courts ascertain what is in the best interests of the child); David M. Johnson, *The Role of the Guardian Ad Litem: Changes in the Wind*, COLO. LAW., Nov. 1998, at 73 (declaring that any lawyer who has litigated a custody case or appeared before the court in a juvenile issue has probably encountered the best interest standard).

353. See Frances Gall, Hill, *Clinical Education and the “Best Interest” Representation of Children in Custody Disputes: Challenges and Opportunities in Lawyering and Pedagogy*, 7 IND. L.J. 605, 630 (1998) (calling the “best interest of a child” the “pivotal concept in family law”).

354. UNIFORM MARRIAGE AND DIVORCE ACT § 402 (amended 1970 and 1973) 9 U. L. A. 561 (1998).

355. See Kathryn L. Mercer, *A Content Analysis of Judicial Decision-Making: How Judges Use the Primary Caretaker Standard to Make a Custody Determination*, 5 WM. & MARY J. WOMEN & L. 1, 149 (1998) (outlining the considerations or factors used to make a custody decision using the best interests standard); Jo-Ellen Paradise, *The Disparity Between Men and Women in Custody Disputes: Is Joint Custody the Answer to Everyone’s Problems?*, 72 ST. JOHN’S L. REV. 517, 579 (1998) (describing the relevant factors in a best interest determination under the Uniform Marriage and Divorce Act); Lauren Shapiro, *An HIV Advocate’s View of Family Court: Lessons from a Broken System*, 5 DUKE J. GENDER L. & POL’Y 133, 165 (1998) (listing the factors in a best interest determination); see also Elizabeth Scott & Robert E. Scott, *Marriage as a Relational Contract*, 84 VA. L. REV. 1225, 1234-35 (1998) (stating that the Uniform Marriage and Divorce Act is the model for several states’ custody statutes).

evaluating the situations of both parents or whether there is a presumption that residence in the U.S. is simply better. Since parent-child separation is a tragic consequence of divorce, safeguards which would guarantee that the utmost consideration is given to such a unique custody decisions are crucial.

VIII. A PROPOSAL FOR THE MODIFICATION OF THE BEST INTEREST STANDARD

A. *The Obstacles in VAWA—Different Solutions*

Even if VAWA survives a constitutional attack women are still often removed. Removal occurs when a battered immigrant does not meet the required standards stated forth in VAWA.³⁵⁶ Despite VAWA's challenges and faults, the incidents of removal will likely rise if the Act is revoked. Therefore, more immigrant women will have to fight for custody of their children on an uneven playing-field because of their lack of legal residency. Subsequently, as more immigrant women are deported, more children will possibly face life without their mothers.

1. The Fight For Custody

It is crucial that an appropriate and adequate standard be used to determine the custody of children who have both deportable immigrant mothers and U.S. citizen fathers. However, the widely used best interest standard has been called "indeterminate."³⁵⁷ Such indefiniteness causes a lack of continuity and predictability in judicial decision-making. With-

356. See *Potential Problem Areas for VAWA Self Petitioners*, LEGAL REMEDIES FOR IMMIGRANT BATTERED WOMEN, (Crim. Just. Div. of the Governor's Office, Austin, Tex.), May 20, 1998, at 163 (on file with *The Scholar: St. Mary's Law Review on Minority Issues*). (revealing the "good moral character" requirement is often an obstacle due to the fact that one arrest may constitute bad character). If an immigrant simply has an arrest on her record, the immigrant's chances for relief under VAWA may be destroyed. See *id.* Furthermore, if the immigrant leaves the country to visit family, and then wishes to make a self-petition from outside the country, she will be denied. See *id.* VAWA petitions may only be made within the United States. See *id.* Therefore, a woman must remain in the United States while making her petition. See *id.* For an immigrant who may not have many resources or places to escape inside the United States, this may present a problem. See *id.* The immigrant most likely is not aware of the fact such a move will ruin her chance to self-petition. See *id.*

357. See Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: A Search for Definitions and Policy*, 31 FAM. L.Q. 613, 628 (1998) (calling the best interest standard "indeterminate"); Laura J. Schwartz, *Religious Matching for Adoption: Unraveling the Interests Behind the "Best Interests" Standard*, 25 FAM. L.Q. 171, 188 (1991) (claiming there are "adverse consequences" to using the best interest standard).

out a standard that offers more objective elements, judges may invoke their personal values or views.³⁵⁸

Understandably, judges have a difficult task when deciding the residence of a child.³⁵⁹ However, judges are increasingly considering domestic violence in child custody cases in which both parents are citizens.³⁶⁰ For example, some judges have decided custody should be awarded to a wife who experiences psychological, sexual, or economic abuse from her husband.³⁶¹ Decisions like these demonstrate the apparent unwillingness of courts to award custody to fathers who abuse their wives. However, in most of these cases, the abused woman is U.S. citizen.

2. Protection for the Children

Are immigrant mothers less deserving of their children? Are children of immigrant mothers less deserving of their mothers? Should children with immigrant mothers be forced to stay in the care of an abusive adult simply because their mother came from another country?

Legislation which will grant immigrant women their residency will enable judges to substantially circumvent the issue of whether a U.S. citizen child will stay in the United States with her abusive father or move to a foreign country with her mother. A few courses of action may be taken to remedy this dilemma. First, Congress could introduce a modified best interest standard as a part of VAWA II. Using this approach, the immigrant woman can petition for her residency and custody of her children under one act. Also, because VAWA II is not on the congressional calendar for 1998-99,³⁶² the most expeditious way to introduce a modified stan-

358. See Schwartz, *supra* note 357, at 188 (inferring that personal biases and influences if judges can result in disproportionate results); Waldman, *supra* note 67, at 152 (calling the judiciaries "pronouncements" on a child's best interest "varied and idiosyncratic" and arguing that judicial pronouncements "provide little guidance and reflect no real, unified view as to how, in any given case, to give effect to those interests").

359. See Elrod & Spector, *supra* note 357, at 628 (stating that custody disputes continue to be the most difficult for judges).

360. See *id.* (asserting that courts are seriously examining the domestic abuse factor in custody cases).

361. See *id.* A New York court affirmed a custody award to the mother by declaring the father "possesses a character which is ill suited to the difficult task of providing his young children with moral and intellectual guidance." Also, a court in California denied a father custody of his children when the court found domestic violence had occurred against the wife, but not the children. The judge reasoned the children had suffered from the affects of the abuse although they had not been directly abused.

362. See *Action Alert: We Need Your § 245(i) Stories*, (National Network on Behalf of Battered Immigrant Women (NNBBIW)) Jan. 5, 1999 (detailing that Congress did not include the VAWA Restoration Act in the final Appropriations Bill).

dard is to attach it onto the bill to consideration in the next Congressional session.

The pitfalls of this first alternative, however, may be troubling. First of all, it may raise more federalism disputes. For example, VAWA currently deals with civil causes of action regarding criminal activity. If an issue, such as child custody, is thrust into the federal courts, the federalism arguments against VAWA may escalate. Furthermore, VAWA may one day face examination by the Supreme Court. If VAWA and/or VAWA II are ever ruled unconstitutional, immigrant battered women would not only lose their self-petitioning rights, but also the leverage to fight for their children.

A second option is to handle this type of a matter purely as an immigration question. In doing so, the decision of where these children may go could be delegated to INS judges. This move may benefit battered-immigrant mothers by allowing them to stay in the country long enough to finish their custody battle even if an INS judge has ordered that they be removed. For example, without knowing the status of the mother's residency petition, the custody judge may hear all the evidence from both parties and decide the child may live with the mother if she is allowed to stay in the United States. Conversely, if the mother is removed, the child will be allowed to move with her. However, if the child returns to his mother's country, he will later be allowed to return to the United States as a citizen. The child may return to the United States either when he reaches the age of majority or, along with the agreement of his mother and a United States court, decides to return to this country as a minor to live with his relatives. The judge may also, if she deems fit, permit temporary annual or biannual visas to the mother and child so the relationship with the father, and other relatives will not be severed.

This option may also create controversy. The logistics are certainly untested. Immigration judges may feel they are unsuited to hear custody cases. Furthermore, the INS may not be able to calculate the expenditures necessary to carry out this added responsibility. In addition, states may again assert this option conflicts with federalist notions because a national agency, the INS, will assume a state power. States may argue the delegation of this power to a federal agency is the equivalent of Congress federalizing child custody through a federal act.

3. The Possibility of a New Act

Creating an entirely separate federal act, solely addressing these unique custody issues, may also modify the best interests standard. Such an act could require that all custody disputes stay within the purview of the states, but establish minimum guidelines the states must follow in determining these types of custody cases. Congress may try to assert its

right to create such requirements through its Commerce Clause power because these custody cases would involve the movement and travel of immigrants and children, who were formerly residing in the United States, across national borders. Such movement may substantially affect the amount of goods and services flowing into and out of many states.³⁶³

A less tenuous connection may be drawn to interstate commerce by asserting that women and children will be crossing state and national borders. In this instance, the connection to interstate commerce is stronger than the commercial connection given by the critics of *Lopez*: poor education eventually affects the nation. An act establishing guidelines for these unique custody cases may withstand Commerce Clause scrutiny because the decrease or increase in the number of consumers across the country is an economic consideration. However, if this option is utilized, while Congress must institute certain requirements, the ultimate decision is left to a state family law judge. Therefore, the state judge must be required to take a more objective stance when evaluating these cases.

One must acknowledge that although possibly less intrusive, some may feel the federal government is still infringing on an issue traditionally considered as belonging to the states: child custody. Also, many of the same Commerce Clause arguments may arise concerning the substantial effect of the movement or non-movement of immigrants and their children. However, such a proposal may be the most equitable medium available.

B. *A Modified Best Interest Standard*

1. Codified Presumption

If one of these options is adopted, the cases must be adjudicated using the new standard. Several factors should be considered in deciding the new standard because it is crucial for judges to understand what consequences their decisions have on the children. Expectedly, such considerations should include housing, supervision, education, safety, and most importantly whether any domestic violence has taken place either against the mother or child. However, the modified best interest standard should

363. See Lilitiana M. Garcés, *Evolving Notions of Membership: The Significance of Communal Ties in Alienage Jurisprudence*, 71 S. CAL. L. REV. 1037, 1055 (1998) (stating that by paying taxes, immigrants have enriched local, state, and federal economies). The U.S. economy benefits from the increased national production created by immigrant workers. See *id.*; Bill Ong Hing, *Don't Give Me Your Tired, Your Poor: Conflicted Immigrant Stories and Welfare Reform*, 33 HARV. C.R.-C.L. REV. 159, 177 (1998) (providing a relatively surprising statistic which compares ten states with the smallest and largest immigrant populations in the United States). Statistics show that unemployment rates in the states with the highest rate of immigration were lower, by almost one-third, than unemployment rates in states with low immigration. See *id.* Immigrants help create jobs for American workers. See *id.* at 176.

include a codified presumption that, although she may not be residing in the United States, an immigrant woman is just as capable of caring for the child as a U.S. citizen father or his family. If the father wishes to assert that the immigrant mother is unable to care for her children elsewhere, he must prove his assertion. The immigrant mother shall not, however, walk into a courtroom and have her lack of residency be an instantaneous mark against her. She must prove, like the father, that she is a loving mother able to provide a safe, caring home for the child, as well as sufficient education and medical care. This presumption evens the playing field by ensuring that judges will not simply inject their beliefs that life in the United States will be better for a child.

2. Judges Working Together Toward a Common Goal

A custody judge should have a right to make recommendations to the immigration judge deciding the immigrant mother's removal case. If the custody judge finds a citizen father is incapable of caring for his children, that judge should have the right to advise the appropriate immigration judge of his findings. In turn, the immigration judge may consider that recommendation in deciding whether the immigrant mother should be allowed to stay in this country in order to raise her children. An immigration judge may affirmatively decide the immigrant mother must remain in the United States if the judge believes conditions in the mother's country of origin are not desirable, yet the mother is a capable parent. The ability to make these type of recommendations could alleviate concerns some may have about separating a child from blood-related parents by placing the child into foster care when the citizen parent is deemed unfit.

3. The Possibility of Visitation

If an immigrant is denied custody and no special recommendation is made, measures should be taken to see that the mother and child are afforded visitation opportunities. Options may include that annual, bi- or tri-annual temporary visas be granted to immigrants for the purpose of visiting their children. Such visas may also be granted to those immigrants retaining custody of their children out of the country. As stated before, these visas would not only allow immigrants to accompany their children on visits to the United States for familial purposes, but may also ensure that the child's welfare is not left unchecked allowing for occasional court ordered evaluations of the child's well-being.

IX. CONCLUSION

Battered immigrants face the difficult task of gaining enough strength and courage to leave their spouses. The country has taken the position that abuse is unacceptable and criminal in regards to U.S. citizen battered

women. To protect these battered women, aid is given in the forms of charity and federal monies. The country would not deny a deserving battered woman her children or choose to place a child in danger by awarding an abusive father custody.

U.S. citizen women do not have to choose between freedom from their abusers, their citizenship, or life with their children. Immigrant women, however, are forced to make such decisions. Unfortunately, VAWA, which offers battered immigrants a means of escape from abuse and an opportunity for legal residency, has recently faced a serious constitutional defeat. Notwithstanding, a more equitable best interest standard is greatly needed. However, should VAWA be found unconstitutional, the incidents of removal from this country will rise. As a result, more custody disputes involving these removable women will occur. It is crucial that a more equitable best interest standard be adopted in order to fairly evaluate the inevitable increase in the number of child custody cases involving immigrant mothers.

A new standard should consider each parent's ability to provide a stable home and environment, medical attention, love, care, and an education. Furthermore, past physical abuse, which occurred while the couple was married, should be considered. However, the immigrant woman should have a guarantee that she is not automatically presumed the lesser parent due to the fact the child will not live in the United States if he goes with her. Therefore, there should be a presumption that an immigrant mother is wholly and equally as capable of caring for the child as the citizen parent, unless the father can prove otherwise.